L. H. Hedrick
Wm. H. Lawrence

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 316

BEN F. WRIGHT, AUDITOR FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

YNCHAUSTI AND COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

94

PETITION FOR CERTIORARI FILED MARCH 16, 1926

CERTIORARI GRANTED APRIL 26, 1926

(31,774)

(31,774)

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THE UNITED STATES OF AMERICA

PHILIPPINE ISLANDS

IN THE SUPREME COURT OF THE PHILIPPINE ISLANDS

G. R. No. 23601—CONCERNING PETITION FOR MANDAMUS

YNCHAUSTI & COMPANY
Petitioner

VERSUS

BEN F. WRIGHT
As Auditor for the Philippine Islands
Respondent

(ORIGINAL JURISDICTION)

BE IT REMEMBERED that, on the dates respectively mentioned, the following proceedings were had in the above-entitled case:

On January 19, 1925, the petitioner, by its attorneys filed with the Office of the Clerk of the Supreme Court, the following petition for mandamus:

(CAPTION AND TITLE OMITTED)

PETITION

To the Honorable Supreme Court
of the Philippine Islands:

Comes now Ynchausti & Company, Petitioner, by its undersigned attorneys, and respectfully shows unto this Honorable Court:

I

That Petitioner is and was, during all the times hereinafter mentioned, a regular collective commercial partnership, duly organized, registered and existing under the laws of the Philippine Islands, and having its principal office and place of business in the City of Manila in said Islands.

II

That Respondent is the duly appointed, qualified and acting Auditor for the Philippine Islands.

III

That V. Aldanese is the duly appointed, qualified and acting Insular Collector of Customs and the duly appointed, qualified and acting Collector of Customs of the Port of Manila, Philippine Islands.

IV

That your Petitioner, during all the times hereinafter mentioned has been and is agent and operator of the S. S. "VENUS," a steam vessel engaged in the coastwise trade of the Philippine Islands.

V

That between February 12th, 1924, and September 16th, 1924, your Petitioner, because no adequate facili-

ties exist therefor in the Philippine Islands, caused certain heavy repairs and reconstruction work to be done in Hongkong on said S. S. "VENUS," the cost of which was $300,004.90, Hongkong Currency.

VI

That upon the arrival of said S. S. "VENUS" in Philippine waters, and on or about the 20th of October, 1924, the said V. Aldanese, in his official capacity as Insular Collector of Customs and Collector of the Port at Manila, by assessment (Entry) No. 316654-A, assessed the customs duty payable on said repairs and reconstruction work at P159,960.00, and made demand upon your Petitioner for the payment of said sum.

VII

That on October 24th, 1924, your Petitioner paid to said V. Aldanese, in his said capacity as Insular Collector of Customs and Collector of Port for the City of Manila, the said sum of P159,960.00 so demanded by him, under protest, No. 14061, dated the same day, said protest being on the ground that said repairs and reconstruction work were exempt from the payment of customs duty under Paragragh 200, Section 8, and Paragraph 348, Section 11 of the Philippine Tariff Act of 1909. A copy of said protest is hereunto annexed, and hereby made a part hereof, marked Exhibit "A."

VIII

That thereafter on October 31st, 1924, and after a hearing, the said V. Aldanese, in his official capacity as Insular Collector of Customs, rendered a decision sustaining your Petitioner's said protest No. 14061, and ordering a refund to your Petitioner of the said customs duty theretofore collected from and paid by it under protest, amounting to P159,960.00, Philippine Currency, as

hereinabove alleged. A copy of said decision is hereunto annexed and hereby made a part hereof, marked Exhibit "B."

IX

That copies of the aforesaid decision, Exhibit "B," of the said Insular Collector of Customs, on the aforesaid protest No. 14061 of your Petitioner, were immediately transmitted by him to the Secretary of Finance of the Philippine Islands and to the respondent Auditor for the Philippine Islands, and the Secretary of Finance failed, within fifteen days, or at any other time, to certify that in his opinion the said decision ought to be revised by the Court of First Instance of the City of Manila, or to order its removal thereto, wherefore said decision has become final and conclusive upon the Government of the Philippine Islands, as provided in Section 1383 of the Administrative Code.

X

That on November 6th, 1924, the respondent, without any authority in law therefor, addressed a letter to the said Insular Collector of Customs, asking the latter to reconsider his said decision, Exhibit "B," and the said Insular Collector of Customs, after due consideration, denied said application for reconsideration, and affirmed his said decision of October 31st, 1924, Exhibit "B."

XI

That on the 26th day of November, 1924, the said V. Aldanese, in his said capacity as Insular Collector of Customs, executed his warrant No. 210175 in favor of your Petitioner for the sum of P159,960.00 said warrant being for the refund of said import duty, entry No. 31654-A, Protest No. 14061, theretofore assessed and collected, as hereinabove alleged, and presented it to the

respondent herein for counter-signature, as provided in Section 621 of the Administrative Code, and the said respondent herein, nothwistanding the request of said V. Aldanese, as Insular Collector of Customs, for said counter-signature, thereupon wrongfully and unlawfully refused and declined and still wrongfully and unlawfully refuses and declines to countersign the same, and in so doing, has prevented and still prevents your Petitioner from obtaining reimbursement for the customs duties wrongfully and erroneously assessed and collected from it, as hereinabove alleged.

XII

That your Petitioner has no other or further recourse in the premises than that herein prayed for, nor any plain, speedy and adequate remedy in the ordinary course of the law, and has sustained and is sustaining great loss and irreparable damage and injury by reason of the wrongful and unlawful action of respondent in declining and refusing to countersign said Warrant No. 210175, all as aforesaid.

WHEREFORE, Petitioner prays that a Peremptory Writ of Mandamus directed to respondent Insular Auditor be issued out of this Honorable Court requiring the respondent forthwith to countersign said Warrant No. 210175; and for such other and further relief as may be proper in the premises, and for costs.

Manila, P. I., January 19, 1925.

FISHER, DEWITT, PERKINS & BRADY,
By
(Sgd.) C. A. DEWITT,
Attorneys for Petitioner,
601 Pacific Building, Manila.

CITY OF MANILA,
PHILIPPINE ISLANDS. } *ss:*

F. V. KAUFFMANN, being first duly sworn, deposes and says: That he is one of the Managing-Partners of

Ynchausti & Company, the Petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that all the facts set out therein are true to the best of his knowledge and belief.

(Sgd.) F. V. KAUFFMANN.

Subscribed and sworn to before me on this 19th day of January, 1925. Affiant exhibited his cedula No. F-3564, issued at Manila, P. I., on January 3rd, 1925.

(Sgd.) TOMAS CONTRERAS,
Notary Public.

My commission expires December 31, 1926.
Doc. No. 31.
Page No. 33.
Book No. 11.
Series of 1925.

EXHIBIT "A"

October 24th, 1924.

The Insular Collector of Customs,
Manila.

Dear Sir:

Please be advised that the sum of One Hundred fifty-nine thousands and nine hundred sixty (P159,-960.00) Pesos paid you today as customs duty under assessment (Entry) No. 31654-A, because of the reconstruction made on the S. S. "VENUS" in Hongkong, pursuant to the provisions of the Philippine Tariff Act of 1909, is paid under protest. This protest is made upon the ground that said reconstruction is exempt from duty by virtue of the provisions of paragraph 200, section 8, and paragraph 348, section 11 of the Philippine Tariff Act of 1909, and the decisions of the Supreme Court in the cases, Fernandez Hermanos vs. Collector of Customs (1915, 30 Phil. 50) and Gutierrez Hnos. vs. Collector of Customs (1919, 39 Phil. 876).

There are enclosed herewith copies of the certificates of Earnshaws Docks & Honolulu Iron Works, Varadero

de Manila and of Messrs. C. B. Nelson and Carlos E. Pombo, which establish the fact that there are no adequate facilities afforded in the Philippine docks to build the main boiler, H. P. cylinder and thrust shafts; and to carry out the reconstruction made on the S. S. "Venus" at Hongkong, hence the same should be exempt from import duty.

Very respectfully,

P2.00 Stamp.

1. The number of the entry covering the reconstruction was declared.. 31654-A
2. The register number assigned the vessel on its arrival after reconstruction 652
3. The number of the voucher upon which payment was made..... 39138
4. The date of payment of the customs duty ..... October 24, 1924

EXHIBIT "B"

Protest No. 14061.

In the matter of Protest Numbered 14061, filed October 24, 1924, by Ynchausti & Co., Manila, against the action of the Insular Collector of Customs, acting as Collector of Customs for the Port of Manila, as to the assessment and collection of duty on cost of repairs the S. S. "Venus," Entry No. 31654-A, Voucher No. 39138, paid October 24, 1924.

DECISION

This protest is against the assessment of duty on cost of repairs made at Hongkong to the steamship "Venus" of Ynchausti & Co., Manila, under paragraph 200 of the Philippine Tariff Act of 1909 at fifty per centum ad valorum instead of exempting the same from duty by virtue of the provisions of paragraph 200 and 348 of the said Tariff Act.

The only question to be considered in this case is whether the repairs are entitled to free duty or not, or whether adequate facilities exist in the Philippine Islands for carrying out such repairs or not. In order to give the protestants an opportunity to prove their claim, a hearing was held on October 27, 1924, and the following evidence was produced:

A letter of Fernandez Hermanos to Mariano Yenko, Marine Surveyor, acting as Marine Superintendent for Ynchausti & Co., dated March 8, 1924, in which the former state that they cannot construct a boiler for the S. S. "Venus" (Exhibit "A").

A letter of the Earnshaws Docks and Honolulu Iron Works to Mariano Yenko, dated February 18, 1924, stating that they are unable to construct a new, complete boiler, but that they have a powerful derrick to remove the old one and place a new one (Exhibit "B").

A letter of the Earnshaws Docks and Honolulu Iron Works to Ynchausti & Co., dated September 25, 1924, informing the latter that the maximum lifting capacity of their floating derrick is 25 tons (Exhibit "C").

A letter of Carlos Pombo to Ynchausti & Co., dated October 9, 1924, advising that it is impossible to construct a boiler with cylinder and a thrust shaft for the "Venus" in the Philippines (Exhibit "D").

A letter of the Earnshaws Docks and Honolulu Irons Works to Ynchausti & Co., dated October 10, 1924, certifying that their shops have no adequate facilities to make H. P. cylinder and thrust shaft with thrust blocks for S. S. "Venus." They also correct the statement contained in their letter of February 18, 1924, Exhibit "B," to the effect that they have found out that the "Venus" boiler is too heavy for their derrick (Exhibit "E").

A certificate of the Hongkong & Whampoa Dock Co., Ltd., stating the weights of the component parts of the boiler built by the same for the "Venus" (Exhibit "F").

A letter of C. B. Nelson, Marine Surveyor, to Ynchausti & Co., dated October 15, 1924, stating that no vessel of the size of the S. S. "Venus" has been reconstructed at this port and has "such extensive repairs carried out," and that the main boiler and thrust shaft could not be made at Manila (Exhibit "G").

The statements contained in the above letters and certificates have been confirmed by the parties subscribing the same, at the hearing, and have been corroborated by the Chief of Hull and Boiler Division of this Bureau. The lack of adequate facilities is, therefore, clearly established and the undersigned is convinced that the repairs to and reconstruction of the Steamship "Venus" could not be effected in the Philippine Islands.

This case is identical with that of Fernandez Hermanos vs. the Insular Collector of Customs (R. G. No. 8667, Vol. 30, page 50, of Philippine Reports) and the decision thereon applies hereto.

Protest No. 14061 is, therefore, for the foregoing reasons, sustained and a refund of the customs duty collected is ordered to the protestants.

(Sgd.) V. ALDANESE,
Insular Collector of Customs.

A TRUE COPY.
(Sgd.) F. CORRALES,
Secretary Board of Protests and Appeals.

On January 21, 1925, the following summons was issued:

(CAPTION AND TITLE OMITTED)

WHEREAS this Court on the 20th instant, approved a resolution which is quoted below:

"Considering the petition filed in case No. 23601, Ynchausti & Company vs. Ben F. Wright, etc., praying that a peremptory writ of mandamus be issued requiring the respondent Insular Auditor to forthwith countersign warrant No.

210175 referred to therein, it is ordered that the respondent demur or answer said petition within ten days from notice hereof and from the receipt of copy of the petition."

NOW, THEREFORE, You are hereby ordered to demur or answer said petition within ten days from the receipt of this summons with a copy of the petition.

Given by HON. E. FINLEY JOHNSON, Acting Chief Justice of the Supreme Court of the Philippine Islands, this 21st day of January, nineteen hundred and twenty-five.

(Sgd.) V. ALBERT,
Clerk, Supreme Court, P. I.

On January 28, 1925, the respondent filed the following motion:

(CAPTION AND TITLE OMITTED)

Comes now the Respondent Ben F. Wright as Auditor for the Philippine Islands, and respectfully requests this Honorable Court for an extension of ten days within which to demur or answer the above entitled petition, for the following reasons:

1. That on January 23, 1925, the Bureau of Audits received by ordinary mail copy of the summons in the above mentioned petition, addressed to said respondent, but that no copy of said petition had been attached to or served with said summons; and that the said respondent, therefore, has not been aware of, nor knew the contents of said petition except this date, January 28, 1925, when a copy of the same was furnished him by the office of the Attorney-General.

2. That said respondent was in Baguio on leave of absence from office since January 16 up to January 27, 1925.

3. That the time for demurring or answering the said petition expires on February 2, 1925.

4. That in view of all the above, said respondent does not, therefore, have sufficient time to study the case and decide what action to take in the premises.

(Sgd.) BEN F. WRIGHT,
Respondent.

Manila, P. I.
January 28, 1925.

On January 30, 1925, the Petitioner filed the following objection to the preceding motion:

(CAPTION AND TITLE OMITTED)

Comes now Ynchausti & Company, the petitioner herein, and objects to the motion of respondent, dated January 28, 1925, praying for an extension of ten days within which to demur or answer the petition herein, on the following grounds:

That the reasons adduced in support of said motion are neither adequate nor sufficient;

That the granting of said motion and the consequent delay of these proceedings will cause your petitioner irreparable damage, because of the large amount herein involved, and the loss of interest thereon. Such interest cannot be recovered from the Government of the Philippine Islands.

WHEREFORE petitioner respectfully prays that the said motion of the respondent herein be denied.

Manila, P. I., January 29, 1925.

FISHER, DEWITT, PERKINS & BRADY,
By: (Sgd.) C. A. DEWITT,
Attorneys for Petitioner.

Rec'd.
1/30/25 at 10:30 A. M.
BFW.

On January 29, 1925, the Supreme Court issued the following resolution:

"Considering the motion of the respondent filed in case No. 23601, Ynchausti & Company vs. Ben

F. Wright, etc., praying for the reasons given, that an exteision of ten days be granted him within which to demur or answer the complaint filed therein, MOTION GRANTED."

On January 31, 1925, the Supreme Court passed the following resolution:

"Considering the motion of the attorneys for the petitioner in case No. 23601, Ynchausti & Company vs. Ben F. Wright, etc., objecting, for the reasons given, to the motion of the respondent asking for an extension of ten days within which to demur or answer the petition therein, OBJECTION OVERRULED."

On February 10, 1925, the respondent filed the following answer to the petition:

(CAPTION AND TITLE OMITTED)

ANSWER

Comes now the undersigned Insular Auditor, respondent in the above entitled action, and answering the petition on file herein alleges:

I

That he admits the allegations contained in paragraphs I, II, III, IV, VI, and VIII of the petition.

II

That he denies all and singular the allegations contained in paragraphs V, VII, IX, X, XI, and XII of the said petition, with the exception of those which, in his defense, may be expressly admitted.

III

That as a special defense, the respondent alleges the following:

1. That the S. S. "Venus" owned and operated by the petitioner is a steam vessel documented for the Philippine coastwise trade, and whose tonnage, gross and net, at the time it was to be repaired, were 987.64 and 597.74, respectively.

2. That prior to February, 1924, said S. S. "Venus" needed certain repairs thereon.

3. That, notwithstanding the existence and availability of adequate facilities therefor in the Philippine Islands, the petitioner, between February, 1924, and September, 1924, caused the said repairs to be done in Hongkong on said S. S. "Venus," the cost of which was $300,004.00, Hongkong currency.

4. That upon the arrival of said S. S. "Venus" in Philippine waters, and on or about the 20th of October, 1924, the Insular Collector of Customs at Manila, by assessment (Entry) No. 316654-A, assessed the customs duty payable on said repairs at P159,960.00, and made demand upon the petitioner for the payment of said sum.

5. That on October 24th, 1924, the petitioner paid to V. Aldanese, in his capacity as Insular Collector of Customs and Collector of Port for the City of Manila, the said sum of P159,960.00, under protest No. 14061, dated the same day.

6. That thereafter on October 31st, 1924, the said V. Aldanese, in his official capacity as Insular Collector of Customs rendered a decision sustaining the said petitioner's protest No. 14061, and ordering a refund to the petitioner of the said custom duty, theretofore collected from and paid by it under protest, amounting to P159,-960.00, Philippine currency.

7. That on the same day, October 31st, 1924, the respondent Insular Auditor received a copy of the aforesaid decision of the Insular Collector of Customs, on the said protest No. 14061 of the petitioner.

8. That the said sum of P159,960.00, assessed as customs duty payable on said repairs to said S. S. "Venus," upon being paid to, and received by, the In-

sular Collector of Customs, was covered into the Insular Treasury of the Philippine Government and became part of the general unappropriated funds of the Insular Government, in accordance with Section 14, Chapter III, of Act No. 2935, notwithstanding the protest made by the petitioner against its payment.

9. That to meet refunds of customs duties or taxes erroneously and illegally collected by the Philippine Government, permanent annual appropriations are provided by Act No. 357, as amended by Act No. 1515.

10. That the duty and responsibility to examine, audit, settle and revise all accounts and claims for refund of customs duties rest solely and exclusively with the respondent Insular Auditor.

11. That immediately upon receipt of the aforesaid decision of the Insular Collector of Customs, on protest No. 14061, the respondent Insular Auditor in pursuance of the powers and duties thus entrusted to him by law as hereinabove alleged, made or caused to be made inquiries and investigations for the purpose of ascertaining and verifying the correctness and veracity of the assertions that the repairs made on the S. S. "Venus" at the Port of Hongkong could not have been executed in the Philippine Islands, and to thereby enable him to determine whether the refund ordered by the Insular Collector of Customs in his decision, or the payment for which credit is claimed, was actually to be made for objects or purposes authorized by Act No. 357 as amended by Act No. 1515, and for the accomplishment of which the particular appropriation in said Act is available.

12. That thereafter on November 6th, 1924, the respondent Insular Auditor, being convinced that adequate facilities for the repairs made on the said S. S. "Venus" are afforded in the Philippine Islands and conscious of the duties and responsibilities entrusted to him by the Jones Law, sent a letter to the Insular Collector of Customs requesting reconsideration of his decision on protest No. 14061 on the ground that it is openly and mani-

festly contrary to the weight of the evidence in this case, and to the provisions of par. 200, Sec. 8, and par. 348, Sec. 11 of the Philippine Tariff Act of 1909, as construed and applied by this Honorable Court in the case of Gutierrez Hermanos v. Collector of Customs, 39 Phil. 876.

13. That on the following day, November 7th, 1924, the respondent also wrote the Honorable the Secretary of Finance of the Philippine Islands, furnishing him with a copy of the aforesaid letter sent by him to the Insular Collector of Customs on November 6th, 1924, and requested said Secretary of Finance to have the aforesaid decision of the Insular Collector of Customs on Protest No. 14061 reviewed by the Court of First Instance in the City of Manila, in the event that the Insular Collector of Customs refused to reconsider his said decision.

14. That on November 12th, 1924, the respondent Insular Auditor, having obtained additional evidence as a result of the investigation and inquiries made that adequate facilities are afforded in the Philippine Islands for the repairs of the S. S. "Venus," reiterated to the Secretary of Finance, the respondent's former request to have the cause removed to the court for review, reminding him that the period within which he could order such removal was to expire on November 14th, 1924.

15. That on November 14th, 1924, the respondent again addressed another letter to the Insular Collector of Customs, furnishing him with additional written proofs demonstrating the incorrectness of his findings and decision, and at the same time requesting him to again review said decision in the light of this newly found evidence, with the idea of assessing and collecting duties on the repairs made on said S. S. "Venus," that could have been executed in the Philippine Islands.

16. That to the two communications of November 7th and 12th, 1924, sent to the Secretary of Finance, the respondent Insular Auditor received from him no reply

nor any other information whatever in connection therewith.

17. That from the Insular Collector of Customs, the respondent likewise received no answer to the two letters of November 6th and 14th, 1924, addressed and delivered to him. On the contrary, the Insular Collector of Customs, on November 26th, 1924, presented to the respondent for counter-signature warrant No. 210175 drawn in favor of the petitioner for the sum of P159,-960.00, said warrant being for the refund of the import duty, entry No. 316654-A, Protest No. 14061, theretofore assessed and collected from said petitioner.

18. That on November 28th, 1924, the respondent returned to the said Insular Collector of Customs the aforesaid warrant No. 210175 for P159,960.00, and informed him that no action thereon could be taken until after the request of the respondent for the reconsideration of the decision of said Insular Collector of Customs on Protest No. 14061, had been passed upon by him.

19. That on the same day, November 28th, 1924, the said Insular Collector of Customs returned the respondent's request for reconsideration of November 6th, 1924, stating that he finds no justification for reconsidering his decision of October 31st, 1924, on said Protest No. 14061.

20. That at the time the herein petition was filed the respondent had not yet finally decided whether or not he would approve and countersign said warrant No. 210175, for the sum of P159,960.00 drawn in favor of the petitioner.

IV

That as a further and special defense the respondent alleges:

1. That the court has no jurisdiction of the subject of the action.

V

That as a further and special defense the respondent says:

That the petitioner has another plain, speedy, and adequate remedy in the ordinary course of law, without resorting to mandamus proceedings, by appeal from the decision of the Insular Auditor first to the Governor-General and second to the Secretary of War.

WHEREFORE, the respondent prays that the petition be dismissed with costs against the petitioner.

Manila, P. I., February 10th, 1925.

(Sgd.) BEN F. WRIGHT,
Respondent,
Bureau of Audits,
145 General Solano, Manila.

Received copy this 10th
day of February, 1925.
FISHER, DEWITT, PERKINS & BRADY,
By (Sgd.) J. ORTEGA,
Attorneys for Petitioner.

On February 11, 1925, the Supreme Court issued the following resolution:

> "The respondent in case No. 23601, Ynchausti & Company vs. Ben F. Wright, etc., having filed his answer to the complaint filed therein, it is ordered that the hearing of said case be set for Tuesday, February 17, 1925, at 9:00 o'clock a. m."

On February 17, 1925, the Petitioner by his attorneys filed the following demurrer to the answer:

(CAPTION AND TITLE OMITTED)

DEMURRER

Comes now the petitioner in the above-entitled cause, by its undersigned attorneys, and respectfully demurs to the answer of the respondent herein on the ground

That the facts stated therein are not sufficient to constitute a defense.

ARGUMENT

THE PLEADINGS

The respondent's answer consists, in part, of allegations constituting a disquisition on his conception of his powers as auditor, of his opinion as to the existence of any other adequate legal remedy and of his opinion as to the jurisdiction of this Court—all of which are conclusions of law. It is our purpose here to show that the facts alleged in the petition and admitted in the answer, plus the *facts* set up in the answer, do not afford the respondent any defense, and that, indeed, because of the admissions in the answer, the petitioner is entitled on the pleadings, to the relief prayed for in the petition.

These facts may be summarized briefly as follows:

That the Insular Collector of Customs, on or about October 20th, 1924, assessed and made demand on the petitioner herein for the payment of P159,960, Philippine Currency, as the duty on certain heavy repairs and reconstruction work done to the S. S. "Venus" in Hongkong during 1924; that the petitioner paid said sum to the said Collector, under protest, on the ground that said repairs were not dutiable under the provisions of Paragraph 200 of the Philippine Tariff Act of 1909, as amended; and that on October 31st, 1924, after hearing the Insular Collector of Customs rendered a decision sustaining said protest and ordering the refund of said P159,960 to the petitioner. The following is a copy of said decision:

> "Protest No. 14061.
>
> "In the matter of Protest Numbered 14061, filed October 24, 1924, by Ynchausti & Co., Manila, against the action of the Insular Collector of Customs, acting as Collector of Customs for the Port of Manila, as to the assessment and collection of duty

on cost of repairs to S. S. 'Venus,' Entry No. 31654-A, Voucher No. 39138, paid October 24, 1924.

"DECISION

"This protest is against the assessment of duty on cost of repairs made at Hongkong to the steamship 'Venus' of Ynchausti & Co., Manila, under paragraph 200 of the Philippine Tariff Act of 1909 at fifty per centum ad valorem instead of exempting the same from duty by virtue of the provisions of paragraph 200 and 348 of the said Tariff Act.

"The only question to be considered in this case is whether the repairs are entitled to free duty or not, or whether adequate facilities exist in the Philippine Islands for carrying out such repairs or not. In order to give the protestants an opportunity to prove their claim, a hearing was held on October 27, 1924, and the following evidence was produced:

"A letter of Fernandez Hermanos to Mariano Yenko, Marine Surveyor, acting as Marine Superintendent for Ynchausti & Co., dated March 8, 1924, in which the former state that they cannot construct a boiler for the S. S. 'Venus.' (Exhibit 'A').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Mariano Yenko, dated February 18, 1924, stating that they are unable to construct a new complete boiler, but that they have a powerful derrick to remove the old one and place a new one (Exhibit 'B').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Ynchausti & Co., dated September 25, 1924, informing the latter that the maximum lifting capacity of their floating derrick is 25 tons (Exhibit 'C').

"A letter of Carlos Pombo to Ynchausti & Co., dated October 9, 1924, advising that it is impossible to construct a boiler with cylinder and a thrust shaft for the 'Venus' in the Philippines (Exhibit 'D').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Ynchausti & Co., dated October 10, 1924, certifying that their shops have no adequate facilities to make H. P. cylinder and thrust shaft

with thrust blocks for S. S. 'Venus.' They also correct the statement contained in their letter of February 18, 1924, Exhibit 'B,' to the effect that they found out that the 'Venus' boiler is too heavy for their derrick (Exhibit 'E').

"A certificate of the Hongkong & Whampoa Dock Co., Ltd., stating the weights of the component parts of the boiler built by the same for the 'Venus' (Exhibit 'F').

"A letter of C. B. Nelson, Marine Surveyor, to Ynchausti & Co., dated October 15, 1924, stating that no vessel of the size of the S. S. 'Venus' has been reconstructed at this port and has 'such extensive repairs carried out,' and that the main boiler and thrust shaft could not be made at Manila (Exhibit 'G').

"The statements contained in the above letters and certificates have been confirmed by the parties subscribing the same, at the hearing, and have been corroborated by the Chief of Hull and Boiler Division of this Bureau. The lack of adequate facilities is, therefore, clearly established and the undersigned is convinced that the repairs to and reconstruction of the steamship 'Venus' could not be effected in the Philippine Islands.

"This case is identical with that of Fernandez Hermanos vs. the Insular Collector of Customs (R. G. No. 8667, Vol. 30, page 50, of Philippine Reports) and the decision thereon applies hereto.

"Protest No. 14061 is, therefore, for the foregoing reasons sustained and a refund of the customs duty collected is ordered to the protestants.

"(Sgd.) V. ALDANESE,
"*Insular Collector of Customs.*"

That on the same day the respondent received a copy of said decision, and, because he did not agree therewith, besought the Insular Collector of Customs to reconsider the same and the Secretary of Finance to order the removal of the record in the matter to the Court of First Instance of Manila under the provisions of Sections 1383, 1384 and 1386 of the Administrative Code for the review of said decision; that the Insular Collector of

Customs failed to act on his request to reconsider said decision and the Secretary of Finance failed to order the removal of the record to the Court of First Instance for review of said decision, as provided in Section 1386 of the Administrative Code; that on November 26th, 1924, the Insular Collector of Customs presented a warrant to respondent, drawing in favor of the petitioner herein, for P159,960, for the refund of said duty so paid under protest, for counter-signature; that respondent returned said warrant without countersignature because no action had been taken on his request for reconsideration; whereupon the Insular Collector of Customs returned said request for reconsideration, denying the same; and that, at the time this petition was filed, respondent had not yet finally decided whether or not he would approve and countersign said warrant.

THE LAW

Our propositions are:

(1) The Philippine Tariff Law, as amended, vests the Insular Collector of Customs with the absolute and exclusive power of determining, in a given case, the dutiability of repairs and construction work effected abroad on vessels of Philippine Registry.

(2) The Collector's decision in this case has become final and binding upon the Government of the Philippine Islands, because the Secretary of Finance failed to order the removal of the record to the Court of First Instance of Manila for the revision thereof.

(3) The Collector's decision on the question involved in the protest was right.

(4) The petitioner has no other adequate remedy, other than that herein prayed for.

(5) This Court has jurisdiction.

Of these in their order:

(1) *The Philippine Tariff Law, as amended, vests the Insular Collector of Customs with the ab-*

solute and exclusive power of determining, in a given case, the dutiability of repairs and construction work effected abroad on vessels of Philippine registry.

A glance at the history of the statute, and of the decisions of this Court thereon will be illuminating.

The original statute read as follows:

"Sec. 8. That the rates of duties to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said islands from the United States or any of its possessions except as otherwise provided in this Act, shall be as follows:

* * * * *

"200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem.

"*Provided*, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act; and

"*Provided further*, That if the owner or master of such vessel shall furnish evidence satisfactory to the collector of customs that such vessel while in the regular course of her voyage was compelled by stress of weather or other casualty to put into a foreign port or place and make such repairs to secure the safety of the vessel or to enable her to return to the Philippine Islands, such duty shall not be imposed; and

"*Provided further*, That furnishings, stores, and supplies, not otherwise provided for, purchased abroad and imported in such vessels shall be dutiable under the corresponding paragraphs of this Act.

"The expression 'imported into the Philippine Islands,' shall be held to mean 'brought into the

jurisdictional waters of the Philippine Islands in or on another vessel, or towed therein by another vessel (except when becalmed or disabled at sea), as distinguished from coming into said islands under the craft's own steam, sail, or other motive power."

Sec. 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph:

* * * * *

"348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, upon proof satisfactory to the collector of customs that adequate facilities of such repairs are not afforded in the Philippine Islands."

There have been two leading decisions of this Court construing the statute above quoted. The first of these decisions is Fernandez Hermanos *v.* Insular Collector of Customs, 30 Phil. Rep. 50. The question there was whether, where a part of the repairs could be effected in the Philippine Islands, and the whole job is done abroad, any part of the repairs so effected are dutiable. This Court, after quoting the statute, answered the question in the negative, and, in so doing, made use of the following language:

"The fundamental defect in the position of the Government is that it divides the repairs which a vessel undergoes into two parts, one of which is composed of those which *can* be made in the Philippine Islands, and the other which can *not* be made in the Philippine Islands. The statute itself makes no such division and we see nothing therein which authorizes it. The Act speaks of the repairs as a whole. No matter how many items compose the repairs, an indivisible whole with which the Act concerns itself and upon which it imposes or does not impose import duties. If the repairs cannot be made in the Philippine Islands, then they can be made in a foreign country and, having been made there, may come

in free of duty. If they can be made in the Philippine Islands, then, if they are made in a foreign country, they cannot come in free of duty. It is distinctly unauthorized by the terms of the law to divide the repairs into two parts and to impose duties on one part and not on the other. Furthermore, such a distinction is unreasonable, if not impossible, and leads to unjust and offensive results."

The respondent seems to think that the second decision operated to modify this doctrine. That decision is Gutierrez Hermanos v. Collector of Customs (39 Phil. Rep. 876.) That the respondent is mistaken in his contention as to the effect of that decision is apparent from a mere reading thereof, and of the discussion therein of the Fernandez Hermanos decision. The pertinent language follows:

"We are not disposed at this late date to discuss and resolve anew the questions presented in the Fernandez Hermanos case. We are, however, not inclined to extend principles which appear to have been carried to the utmost limit by this opinion so as to include thereunder cases that the law certainly did not contemplate. While the rights of the shipowner must not be neglected, so also must the public interest be protected. A Tariff Law intended to foster home industry must be permitted to serve its purpose.

"The two cases are not the same. In the Fernandez Hermanos case there was no dispute that it was impossible to effect certain of the repairs in the Philippine Islands. In the case at bar there is likewise no dispute that the Philippine Islands had adequate facilities for all of the repairs with the exception of the manufacture of the tail shaft. The Government insists, and we think it is established, that the job could have been completed in the Philippine Islands if the tail shaft had been obtained elsewhere. If the parts and pieces necessary for the repair of ships can be obtained in other ports and installed in the Philippine Islands the protective aims of the Tariff Law are fulfilled. If, however, a shipowner

can on the slightest excuse have one small part made in a foreign port in order to have all the repairs made there, then the intent of the Legislature is frustrated."

The date of the Gutierrez Hermanos decision was March 31, 1919. Apparently, fearing that the decision of this Court in the latter case would lead to restrictive administrative interpretation that, in turn, would injure shipowners and the public, the Legislature, acting under the authority contained in Section 10 of the Jones Law, enacted its Act No. 2872, approved Nov. 24th, 1919, amending the above quoted provisions of Paragraph 200 of Section 8 of the Tariff Law of 1909, to read as follows:

"200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade and plying usually in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorum until December thirty-first, nineteen hundred and twenty-four; twenty-five per centum ad valorum on and after January first, nineteen hundred and twenty-five.

"*Provided*, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act; and

"*Provided further*, That if the owner or master of such vessel shall furnish evidence satisfactory to the collector of customs that such vessel while in the regular course of her voyage was compelled by stress of weather or other casualty to put into a foreign port or place and make such repairs to secure the safety of the vessel or to enable her to return to the Philippine Islands, such duty shall not be imposed; and

"*Provided further,* That furnishings, stores, and supplies, not otherwise provided for, purchased abroad and imported in such vessel shall be dutiable under the corresponding paragraphs of this Act.

"The expression 'imported into the Philippine Islands' shall be held to mean 'brought into the jurisdictional waters of the Philippine Islands, in or on another vessel, or towed therein by another vessel (except when becalmed or disabled at sea), as distinguished from coming into said islands under the craft's own steam, sail, or other motive power.' "

This Act was approved by the President of the United States and was put into effect by proclamation dated December 11, 1919.

The result is that whatever there may be in the respondent's somewhat unusual views about his own powers, as derived from the Jones Law, we have Act 2872, approved by the President of the United States, and enacted under express authority contained in that same law, whereby the decision of the dutiability of repairs effected abroad on vessels documented for the Philippine trade is vested exclusively in the Insular Collector of Customs. To that extent, certainly, Act 2872 operates to divest the respondent of the powers he now claims in virtue of the Jones Law with respect to questions such as the one here at issue.

Respondent seems to think that if the repairs—or any of them—under the Gutierrez Hermanos decision—could in any way be effected in the Philippine Islands, then at least such repairs, effected abroad, are dutiable. But such is not the case. The Collector is vested with the exclusive power to determine, under Act 2872—

(1) The adequacy of the facilities;

(2) Whether the facilities are such that the repairs *can be done here reasonably economically, and within a reasonable time.*

In this case, he has found those issues adverse to the Government, as, by the above quoted provisions of the

law, he was empowered to do—and his decision is absolutely binding on all administrative officers of the government. It was *not* the duty of respondent to interfere—or question the decision—or go running about town seeking for proofs to upset the decision—or to withhold counter-signature to the warrant, because he disagreed therewith. It was his duty, a purely ministerial one, to determine whether such a decision had been rendered, and, upon ascertaining that fact, to countersign the warrant, thereby making the decision effective.

Respondent seems to take the position that the Jones Law vests him with absolute power in such matters as these, in the exercise of which he may reverse the decisions of all other administrative officials of this government and may deny the jurisdiction of this court. In other words, all protests decided by the Collector of Customs and the Collector of Internal Revenue are subject to review and to reversal by him, either on questions of fact or law. Such extravagant claims to be sustained, would have to be pretty clearly expressed in the governing statute—and the Jones Law certainly does not support him in this contention. Thus, Section 24 of the Jones Law provides:

> "The auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States, and the Comptroller of the United States Treasury," * * *

This provision of the organic law is both a *grant* and a *limitation* of authority. This Court so held in Compania General de Tabacos de Filipinas v. French (39 Phil. Rep. 48) in the following language:

> "Section 24 of the Jones Law confers upon the Insular Auditor 'like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States

Treasury,' except as otherwise expressly provided in that Act. This grant of authority is, we believe, to be construed as *limiting* as well as *conferring* authority, and that unless the authority now asserted by the Insular Auditor has been conferred upon similar officials of the United States, it has not been conferred upon him by the Jones Law."

Now, it has been repeatedly held that, where such discretion is vested in another officer as is here vested in the Collector of Customs, his decisions with respect thereto are controlling upon the accounting officials of the Government, and that their duty to execute and carry out the decisions is purely ministerial.

"The reason alleged for this refusal by the accounting officer is, that by his construction of the second section of the Act of 3rd of March, 1835, ch. 27, the Secretary of the Navy had no authority to make such appropriation of the funds of the government in his hands. * * *

"Notwithstanding an opinion of a late Attorney-General to the contrary, the accounting officer 'entertains no doubt' that the expenses * * * are among the 'allowances' prohibited by this Act, and has consequently felt bound to repudiate the Secretary's construction of the law, and his opinion as to the powers and duties of his Department.

* * * * *

"The Executive Department of the government, to which is intrusted the control of the subject matter, must necessarily determine all questions appertaining to the employment and payment of such temporary agents, and exigency which demands their employment. The Secretary of the Navy represents the President and exercises his power on the subjects confined to his Department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the Constitution and laws, do not require the approval of any officer of another department

to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments."

(United States v. Jones, 18 How. 92; 15 L.Ed. 274.)

"What was said in United States v. Jones, 59 U. S. 92, 18 How. 96, may be repeated here, as applicable to accounts which have been finally acted upon by a head of department, invested with authority in the premises. There the question was as to the right of accounting officers to review the action of the secretary of the navy in approving certain disbursements made by an officer of the navy in conformity with the orders of the secretary. This court said: 'The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments.'"

(United States v. Johnston, 124 U. S. 196 31 L.Ed. 389.)

"Where the law has appointed another officer or tribunal to examine and certify claims against the state and has made such certificate conclusive, the duty of the Auditor or other proper officer to draw a warrant for the payment thereof is purely ministerial, and enforceable by mandamus."

(19 Am. & Eng. Cyc. L. p. 787, citing numerous cases; People ex rel New York Cent. & H. R. R. Co. v. Walsh, 144 N. Y. S. 367; In re Freel, 148 N. Y. 165, 42 N. E. 586; Bodine v. McDaniel Auto Co., 170 Pac. 899; Hopley v. Benton, 38 Okl. 223, 132 Pac. 808; Clark v. Warner, 204 Pac. 929.)

"On the other hand, it must be conceded that when there is an available fund, duly appropriated for the purpose, the Auditor cannot question the validity or regularity of the acts of any

other officer or tribunal authorized to pass upon and certify the justness of the claim covered by the appropriation. He acts in a ministerial capacity in issuing warrants upon mandamus to act when he wrongfully refuses to do so."

(Danley, Auditor v. Whitely, 14 Ark. 687.)

"It is not within the province of the accounting officers of the Treasury to construe the pension laws and give instructions to pension agents as to the payment of pensions. This properly belongs to the Commissioner of Pensions, whose duty it is, under the direction of the Secretary of the Interior, to administer these laws. The certificate and his orders as to its payment are binding upon the Comptroller and Auditor."

(1882) 17 Op. Atty. Gen. (U. S.) 339, 340;
(1888) 19 Op. Atty. Gen. (U. S.) 214;
(1891) 20 Op. Atty. Gen. (U. S.) 178.

"The heads of Departments have a rightful authority to direct allowances to be made, or to reject claims for allowances, in settling and adjusting accounts relating to the business of their respective departments; and such directions and rejections ought to be conformed to by the Auditors and Comptrollers respectively."

(1852, 5 Op. Atty. Gen. (U. S.) 630, 656.)

"Where a vessel in the Navy has been unheard from so long that her wreck may be presumed, the determination by the Secretary of the Navy of the day when the wreck, destruction, or loss shall be deemed to have occurred is binding upon the accounting officers of the Treasury Department in settling the accounts of seamen and others, not officers, borne on the books of the vessel."

(1921, 32 Op. Atty. Gen. (U. S.) 427.)

"Mandamus will lie to compel the refunding of moneys illegally collected of individuals where the law requires such refunding; and this in the case of taxes on exempt property, even though the exemption depends upon matters of fact

which he is to inquire into and pass upon. The refunding in such a case is a mere ministerial duty; the officers are supposed to know the law, and it is their duty to apply it to the facts as they find them."

(4 Cooley, On Taxation, sec. 1606, p. 3211.)

In conclusion, then, we submit that, under the provisions of Act 2872, amending the Tariff Law of 1909, the Collector of Customs was vested with absolute and exclusive jurisdiction to decide the question of the dutiability of repairs such as those here in question, effected on the S. S. "Venus," and that his decision thereon is absolutely binding on the respondent. It was the respondent's duty, a purely ministerial one, to sign the warrant.

(2) The Collector's decision in this case has become final and binding upon the Government of the Philippine Islands, because the Secretary of Finance failed to order the removal of the record to the Court of First Instance of Manila for the revision thereof.

This proposition does not require extended treatment. It follows as an inevitable conclusion from a reading of Sections 1384, 1386, and 1383 of the Administrative Code. These sections are as follows:

Section 1384. *By whom cause may be removed into Court.*—The removal of a cause into court may be had at the instance of the protesting party or, in case of seizure, at the instance of the owner or agent of the seized property. If the decision of the Insular Collector is adverse to the Government, the cause may also be removed, in the manner hereinafter specified, by order of the Department Head.

Sec. 1386. *Removal upon order of Department Head.*—Upon making any decision which may be removed upon the order of the Department Head, the Insular Collector shall immediately transmit a copy of such decision to him and also to the Insular Auditor; and if within fifteen days thereafter the Department Head shall certify that in his opinion the decision ought to be revised by the Court of First Instance in the city of Manila, it shall be the duty of the

Insular Collector, upon notification thereof, to transmit the original record to said court in the same manner as upon removal by a party other than the Government.

Sec. 1383. *Review in Court of First Instance.*— The party aggrieved by the decision of the Insular Collector in any matter brought before him upon protest or by his action or decision in any case of seizure may procure the cause to be removed for review into the Court of First Instance sitting in the city of Manila, in the manner and within the period hereinafter prescribed.

Unless the proper party in interest shall procure the cause to be thus removed into court for review, the action or decision of the Insular Collector shall be final and conclusive against him.

But respondent may argue that these provisions are contrary to the powers conferred upon him by the Jones Law, and that he, being so keenly "conscious of the duties and responsibilities entrusted to him" by that law, is bound to ignore the clear provisions of the Administrative Code above quoted.

Our answer is that, if the Administrative Code has effected any changes in the administration of the Tariff Law, so far as affected by the Jones Law, then, inasmuch as it postdates the Jones Law, and was approved by the President of the United States on October 1, 1917 (*In re* McCulloch Dick, 38 Phil. Rep. 41, 81), it prevails over the Jones Law under the express provisions of Section 10 of that Act expressly authorizing the Philippine Legislature, with the approval of the President of the United States, to enact amendments of the Tariff Law.

It is submitted, then, that the decision of the Insular Collector of Customs here in question has, for failure to remove the same within the statutory period, become final, and, therefore, conclusive upon the Government of the Philippine Islands, and it is the plain ministerial duty of respondent to recognize the finality and conclusiveness thereof, and to execute the same.

(3) *The Collector's decision on the question involved in the protest was right.*

The pleadings do put in issue the question of the existence of adequate facilities in the Philippine Islands, for the economical accomplishment of the repairs here involved. We feel that this Court and the respondent are bound by the decision of the Collector thereon, but we do want the Court to know that the Collector's decision is right on the facts and on the law. The decision shows clearly that the repairs consisted largely of the construction and installation of a large boiler, with cylinder and thrust shaft. Plenty of evidence was offered that such a boiler and thrust shaft could not be built and installed in the Philippines, and that the other repairs effected were incidental to the ripping out of the old boiler and thrust shaft and the installation of the new. In other words, that portion of the work for which no facilities whatever were offered in Manila, entailed the practical tearing down and rebuilding of the entire ship.

This brings the case well within the doctrine of the Fernandez Hermanos case—and well without the doctrine of the Gutierrez Hermanos case, to which we have already referred, even if the statute had not been changed. In the Fernandez Hermanos case the facts were that a substantial portion of the repairs could not be effected in the Philippine Islands—and the decision was that, in such case, the repairs could not be segregated but should be treated as a unit, and exempted from the duty. There was no question of interfering with the findings of the Collector in that case, as he expressly found that no adequate facilities existed in the Philippine Islands for certain of the repairs in question. In the Gutierrez Hermanos case, the question was whether the fact that one small part of the repairs could not be effected in the Philippine Islands would justify the shipowner in seizing upon the opportunity to have large repairs effected for which facilities exist in the Philippine Islands.

We submit that ours is the former case. The building of a boiler to replace one already in place—of a thrust shaft and cylinder, are such tremendous changes in the ship that they cannot be regarded in any sense, as the building of "one small part" thereof, such as the Court found to be the situation in the Gutierrez Hermanos case.

Moreover, since the latter decision was handed down, the law has been changed, as we have already pointed out. Now, it is not a question whether adequate facilities exist whereby the repairs may *possibly* be effected, but whether adequate facilities exist whereby the work can be done *reasonably economically* and in a *reasonable time* in the judgment of the Insular Collector of Customs.

Now, we submit that it would be the height of folly to ask the owners to have just that amount of work done in the "Venus" in dry dock in Hongkong, that could not possibly be done here, and then bring her to Manila to have the balance effected. There can be no such economical division of the work. Many repairs can be carried on simultaneously. Would it be economy to compel the shipowner to postpone such of those repairs as could be effected here, until the completion of the other repairs and her arrival here, entailing putting the ship on the slipway again, with additional expense and loss of time.

No consideration of public policy is subserved by thus increasing the maintenance expense of the ships engaged in our interisland trade. So, to increase them is to throw an added burden on the public in the way of rates, because such expenses must, in the last analysis, be met by the shipping and travelling public.

We submit, then, that apart from the question of the conclusiveness of the decision of the Collector of Customs, which we have already dealt with, the decision was intrinsically right, and should have been sustained and executed without question.

(4) *The petitioner has no other adequate remedy other than that herein prayed for.*

(5) *This Court has jurisdiction.*

If respondent has in mind the administrative appeal to the Governor-General in alleging that we have another adequate remedy, and that this Court has no jurisdiction, that contention has already been settled by this Court in Compania General de Tabacos *v.* French (39 Phil. 29, 57). The language on this point was as follows:

> "But it is argued that the action cannot be maintained because it does not appear from the petition that the petitioner has appealed from the action of the Insular Auditor to the Governor-General. In section 653 of the Administrative Code (1917) it is declared that any person aggrieved by a decision of the Insular Auditor may, within one year, appear to the Governor-General. In Section 656 it is declared that the action of the Governor-General affirming the Auditor's decision shall be final; but if he reverses the Auditor, the matter goes to the Secretary of War whose decision shall be conclusive. Provisions to the same effect are found in the Jones Law, sections 24, 25. It is our opinion that the word 'final,' as used in section 656 of the Administrative Code in speaking of the action of the Secretary of War, has reference to the finality and conclusiveness of the proceedings in an administrative sense—that is, final and conclusive upon the executive branches of the Government. In other words, section 656 follows the tenor of section 655 where it is said that the decision of the Insular Auditor shall be conclusive, subject to appeal or review as in section 656 provided. It results that the proceedings under section 653 to 656, inclusive, of the Administrative Code (1917) are at no stage binding upon the courts, whether an administrative appeal is taken or not. The circumstance that no appeal to the Governor General was taken by the petitioner in the instant case is, therefore, immaterial so far as the judicial solution of the controversy is concerned. By its election not to take the matter before the Governor-General, the petitioner left the decision of the Insular Auditor, in effect,

considered as an administrative decision, and section 653, as we have already seen, defines the effect to be given to it. The petitioner, of course, was bound to await action by the Insular Auditor because, until this officer acted, it could not be known that the petitioner's claim was questioned. The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts."

Something bearing on the question was also said in the recent case of Zobel *v.* The City of Manila, G. R. No. 22201. The language is as follows:

> "Another reason advanced for supposing the contract for the purchase of this property to be invalid, or at least unenforcible, is that the Insular Auditor has refused to countersign the warrant for the first installment of the purchase price; and it is insisted for the defendant that this action on his part is conclusive against the plaintiffs. Their sole recourse, so it is claimed, is, or rather was, by way of administrative appeal from the action of the Auditor to the Governor-General. The suggestion is in our opinion without merit. *The general provisions of law defining the jurisdiction and powers of the Auditor and which, if literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the Government must be considered to be qualified* as regards the contract rights of persons dealing with the City by the more specific provisions declaring how and by whom contracts can be made which will be binding on it. It was not intended that the Auditor shall possess a general veto power over all city contracts, and his refusal to countersign the warrant referred to is of no moment in this action to enforce the legal liability of the city."

Paraphrasing the above language, we also say:

"The general provisions of law defining the jurisdiction and powers of the Auditor and which, if literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the Govern-

ment must be construed to be qualified—by the specific provisions of the Tariff Law of 1909, as amended by Act 2872, vesting in and conferring upon the Insular Collector of Customs, the absolute power of determination of the facts on which the question of the dutiability of repairs effected abroad on vessels of Philippine documentation depend.

We submit, then, that the failure to prosecute an administrative appeal is not a bar to the remedy herein sought, and does not oust this Court of its jurisdiction.

There is a concluding paragraph in the respondent's first special defense, that we are at a loss to understand, coming as it does from a supposedly responsible official. It is to the effect that, on the date of the petition, he had not as yet made up his mind what action he was going to take with respect to the warrant. We are prepared to show that he did, definitely, on December 31st, 1924, decline to countersign said warrant, and did, definitely and finally return the same to the Insular Collector of Customs, at the same time advising the Insular Collector of Customs of his rather exaggerated views as to the measure of his own powers. At least the allegation shows that, on the filing of the petition he had failed to countersign the warrant, and surely it may not be contended that the petitioner is bound to wait for the performance of the Auditor's ministerial duty to countersign the warrant until some mental process is evolved in his brain which he will be pleased to christen "a final decision." Substantial and undoubted rights may not thus be withheld indefinitely, at the whim of any man, be he official or otherwise. No, whatever his mental state of indecision may be, and we can well appreciate that he must have the gravest doubts about the soundness of his views, we are not bound thereby, but rather by his outward definite refusal to countersign the warrant.

In conclusion, we believe that the case can be disposed of on the pleadings. There is one point about which

there may, however, be some question. The Auditor's answer only admits, *by implication*, that the decision was forwarded to the Secretary of Finance and that the latter has failed for fifteen days thereafter, to order the removal of the record to the Court of First Instance of Manila for the revision thereof. All the allegations of the petition are specifically denied in the answer, except those *expressly* admitted. Moreover, the grounds on which petitioner based its protest are not admitted in the answer. And finally, of course, issue is made as to the existence of adequate facilities in the Philippine Islands for the repairs in question.

It is obvious that respondent is of the opinion that the complaint states a good cause of action, otherwise he would have demurred. The effect of his answer is to raise the above issues of fact, for which, unless the admissions of his answer are regarded as sufficient to dispose of the case, a commissioner should be appointed to receive the testimony.

We submit, in conclusion, that the respondent is asserting powers in this case that are subversive of our whole scheme of government here; he claims to be the supreme arbiter of all claims such as the one here in question, and that other officials charged with the decision thereof under specific provisions of the law render such decisions subject to review by him, notwithstanding the specific provisions of law providing for the review thereof by the courts.

We submit that this position is absolutely untenable; that the demurrer herein should be sustained; and judgment on the pleadings rendered in favor of the petitioner herein for the remedy prayed for.

Respectfully submitted,

FISHER, DEWITT, PERKINS & BRADY,

By (Sgd.) C. A. DEWITT.

Manila, P. I.,
February 17, 1925.

After a thorough discussion of the question on the day of the hearing, February 17, 1925, by both parties who presented their arguments orally and in writing, the Supreme Court passed the following resolution:

> "At the hearing of case No. 23601, Ynchausti & Co. vs. Ben. F. Wright, etc., there appeared attorney DeWitt for the petitioner and attorney Emiliano Remo for the respondent. The court granted the respondent ten days within which to file a memorandum therein and the petitioner ten days from the date he receives copy of the respondent's memorandum."

On February 27, the respondent filed his memorandum and attached thereto the following exhibits:

EXHIBIT "A"

Manila, P. I., March 8, 1924.

The Insular Collector of Customs,
Manila.

Sir:

I have the honor to request for opinion as to whether the general repairs to be made on the hulls of the S. S. "Venus" in Hongkong will be subject here to the payment of import duties. For your information, I have to state that the said vessel will be sent to that port where new boiler will be installed in place of the old one. In removing the main boiler, the hulls will necessarily be opened, and all defective parts repaired or renewed, thus the reconstruction or general repairs of the hulls will be inevitable. The repairs to be made in the hulls will be for the seaworthy, safety and economical operation of the ship. I am of the opinion that said repairs are exempt from payment of duties following the doctrine laid down by the Supreme Court in the case of Fernandez Hermanos vs. Collector of Customs (30 Phil. Rep. 50), regarding repairs made on the S. S. "Islas Filipinas," in foreign port.

Hoping to receive a reply at your earliest convenience, I remain,

Respectfully,
(Sgd.) MARIANO YENKO.

EXHIBIT "B"

March 13, 1924.

Mr. Mariano Yenko,
Marine Surveyor,
104 Dasmarinas, Manila.
Sir:

I beg to acknowledge receipt of your letter of the 8th instant, asking for opinion as to whether or not the general repairs to be made on the hulls of the S. S. VENUS in Hongkong will be subject to the payment of import duties in the Philippine Islands. You state that the vessel will be sent to Hongkong for the installation of a new boiler in place of the old one, and that in removing the main boiler the hulls will necessarily be opened and all defective parts repaired or renewed, thus making the reconstruction or general repairs of the hulls inevitable.

In order that repairs made in foreign countries to vessels documented in the Philippine Islands may be admitted free of duty, the law provides that it must be proven to the satisfaction of this office that adequate facilities are not afforded in the Philippine Islands for such repairs. Evidently as an attempt to prove in advance that adequate facilities do not exist in the Philippines, you forwarded a letter from the Earnshaws Docks & Honolulu Iron Works stating that their shops are unable to construct a complete new boiler for the VENUS due to the lack of proper facilities, but that they are fully equipped to remove the old boiler and install the new one in its place and make all the necessary repairs. Accordingly, if the new boiler can be obtained somewhere, the installation thereof can be done in the Philippine Islands, as well as incidentally all repairs on the hulls. It, therefore, follows, that, with the new boiler on hand, adequate facilities are afforded in this country for the repairs in question.

In the case of Gutierrez Hermanos vs. Collector of Customs, 39 Phil. Rep. 876, the Supreme Court declared that the Tariff Law was intended to foster home industry and that it must be permitted to serve its purpose. The following conclusions were laid down:

"If the parts and pieces necessary for the repair of ships can be obtained in other ports and installed

in the Philippine Islands, the protective aims of the Tariff Law are fulfilled. If, however, a ship-owner can on the slightest excuse have one small part made in a foreign port in order to have all the repairs made there, then the intent of the Legislature is frustrated."

While it is true that a ship's boiler is not a small piece, yet a boiler for a vessel of less than 1,000 gross tons is capable of being imported into the Philippine Islands. Articles of this kind to be used in the construction, equipment or repair of vessels are entitled to free entry under Paragraph 349 of the Tariff upon compliance with the corresponding regulations.

In view of all the foregoing, the undersigned is of the opinion that all repairs made to the VENUS in Hongkong, with the exception of the installation of the new boiler, are subject to the payment of duty.

Respectfully,

V. ALDANESE.
Insular Collector of Customs.

EXHIBIT "C"

The Government of the Philippine Islands
Department of Finance
BUREAU OF CUSTOMS
Manila

October 27, 1924.

Hearing in the matter of Protest No. 14061, filed by Ynchausti & Co., against the payment of duties on materials used in the reconstruction of the S. S. "Venus."

Present: Mr. F. Corrales, Secretary, Board of Protests & Appeals; Mr. Mariano Yengko, representing Messrs. Ynchausti & Co.; Messrs. Carlos Pombo and C. B. Nelson, Marine Surveyors; Mr. Thomas Earnshaw, Manager, Marine Plant, Earnshaws Docks and Honolulu Iron Works; and Mr. Baxter, Chief of Hull & Boiler Division.

QUESTIONS BY MR. CORRALES,

STATEMENT OF MR. YENGKO
Duly Sworn.

Q. What is your name and occupation? A. Mariano Yengko, Marine Surveyor.

Q. What connection have you with Ynchausti & Co.? A. In this case as marine superintendent for the company.

Q. In connection with their Protest No. 14061 against the payment of the amount of P159,960.00 for duties assessed on the materials used in the reconstruction and repair of the S. S. "Venus," what statement do you want to make to show that these reconstruction and repairs could not be carried out in the Philippine Islands? A. I want to produce the evidence consisting of the testimonies showing that the reconstruction carried out on the S.S."Venus" at Hongkong Whampoa Dock Co., Ltd., Hongkong, was necessary in view of the fact that the repair shops in the Philippine Islands have no adequate facilities to do it. Attached to the protest against the payment made, there are the certificates of the parties affected and interested in this case who concur in my statement that there really exist no adequate facilities for undertaking such work. From the beginning it was already known positively that it was not possible to construct a boiler weighing 32 tons, a thrust shaft weighing 4 tons and a cylinder weighing 7 tons for the reason that these main parts composing the vessel's engine could not simply be done in the Philippines and for the further reason that if such a construction was made on board this steamer it would have been necessary to reconstruct also the main parts of the hull besides construction of new cabins to put it in condition as a passenger vessel, and this could not have been done in the Philippines as it was done in the said port. For these reasons, the company which I am representing decided to have the work carried out outside of the Philippine Islands in the conviction that the materials entering therein would be exempt from the payment of duty which would, otherwise, be subject thereto under the provisions of paragraph 200, section 8, and of paragraph 348, section 11, of the Philippine Tariff Act of 1909. I present personally the parties who have subscribed the certificates, Messrs. Tomas Earnshaw, Carlos Pombo and C. B. Nelson.

Q. Have all the materials, on which duties have been paid been employed in the repair and reconstruction of the S. S. "Venus"? A. Yes, sir.

Q. Attached to the entry No. 31654-A, Voucher No. 39138, there is an invoice of the Hongkong and Whampoa Dock Co., Ltd., of Hongkong showing the amount

of $300,004,90, Hongkong currency, purporting to cover the value of the materials used and the work made on the S. S. "Venus." Is this account correct? A. Yes, sir.

STATEMENT OF CARLOS POMBO

Duly sworn

Q. What is your name and occupation? A. Carlos Pombo, Marine Surveyor and constructing engineer.

Q. Here is a certificate signed by you, dated October 9, 1924. Is this your certificate and do you confirm the statement contained therein? A. Yes, sir.

Q. If you have sufficient knowledge of the work carried out on the S. S. "Venus," could you tell which parts of the vessel could not be constructed or repaired in the Philippine Islands? A. As I say in the certificate, the boiler, the cylinder and the thrust shaft could not be made in the Philippine Islands, although the rest of the work could have been done.

Q. Do you mean that there are no adequate facilities in the Islands? A. Yes.

STATEMENT OF MR. TOMAS EARNSHAW

Duly sworn.

Q. What is your name and occupation? A. Tomas Earnshaw, Manager, Marine Plant, of the Earnshaws Docks and Honolulu Iron Works.

Q. Is this your certificate? A. Yes, sir.

Q. Do you confirm your statement that there is no adequate facilities in the Philippine Islands to carry out such reconstruction? A. Yes.

Q. Is this certificate you refer to a letter of February 18, 1924, in which you state that this work could have been done in the Philippine Islands, and later that you are not equipped with a proper derrick for removing the old boiler and replacing a new one. Do you mean to say that the boiler of the S. S. "Venus" is too heavy for your derrick? A. Yes.

Q. With the exception of these main parts of the engine, could the other work have been carried out here? A. Yes.

STATEMENT OF MR. NELSON

Duly sworn.

Q. What is your name and occupation? A. C. B. Nelson, Marine Surveyor.

Q. Is this your certificate dated October 15, 1924? A. Yes.

Q. From what you have observed, was there any other vessel of the size of the S. S. "Venus" that was reconstructed or generally repaired in the Philippine Islands? A. Not to the same extent as the S. S. "Venus."

Q. Do you confirm your statement that the main boiler and thrust shaft could not be made in Manila? Yes, I do.

Q. Are you familiar with the facilities of the shops repairing vessels in the Philippines? A. Yes, sir.

Q. Are you also an inspector of the Bureau Veritas in which the vessel "Venus" is registered? A. Yes, I am acting surveyor of the Bureau Veritas.

TESTIMONY OF MR. BAXTER, Supervising Inspector of Hulls and Boilers, Bureau of Customs.

Q. Mr. Baxter, from your experience, could you tell whether all the works carried out on the S. S. "Venus" could have been done in the Philippine Islands or not? A. Not all.

Q. Are you familiar with the facilities of the work shops here for vessels? A. Yes.

Q. And from your experience as Supervising Inspector of Hulls and Boilers could you tell whether there are apparatus of sufficient capacity such as derricks and other important instruments, to lift heavy pieces and to carry out this work. A. No, there are none of sufficient capacity.

Q. Do you concur in the statements made by Messrs. Pombo, Earnshaw and Nelson and also of Mr. Yengko to the effect that we are lacking facilities in the Philippines to undertake such a big work? A. Yes.

Q. We take for instance the boiler, can you tell whether that boiler is too heavy for the Earnshaw's derrick? A. Yes, it is too heavy. It is about 10 tons over.

Q. And to lift or properly handle the thrust shaft, are there no adequate facilities? A. None.

I hereby certify that the foregoing is the true and correct transcription of the notes taken by me during the investigation held on the above-mentioned date.

(Sgd.) FELISA GOMEZ,
Stenographer.

EXHIBIT "D"

The Government of the Philippine Islands
BUREAU OF AUDITS
Manila

November 6, 1924.

The Insular Collector of Customs,
Manila.

Sir:

Under the provisions of Customs Administrative Order No. 125, dated June 15, 1921, I have the honor to request for reconsideration of the decision rendered on Protest No. 14061, filed by Messrs. Ynchausti & Company, against the action of the Insular Collector of Customs, acting as Collector of Customs for the Port of Manila, as to the assessment and collection of duty on the cost of repairs made on the S. S. "Venus" at the Port of Hongkong, for the following grounds:

1. The decision of the Insular Collector of Customs is openly and manifestly against the weight of evidence, both oral and documentary.

2. The decision as rendered is manifestly against the provisions of law involved.

The decision as rendered is manifestly against the weight of evidence presented inasmuch as it is not entirely in accord with the salient facts brought out at the hearing as well as those embodied in the various certificates and letters presented to corroborate the findings at the hearing. After a careful perusal of the decision, one is forcibly led to arrive at the conclusion that no adequate facilities exist in the Philippine Islands for carrying out the repairs made on the S. S. "Venus," and therefore said repairs should be exempted from duty by virtue of the provisions of paragraph 200 and 348 of the Tariff Act of 1909. This conclusion is entirely different from that which can be adduced by going over the various certificates and letters as well as the record of the minutes of the

hearing. In the decision, it is stated that the lack of adequate facilities in the Islands is clearly established and that the repairs to and reconstruction of the S. S. "Venus" could not have been effected in the Philippines. At the hearing, various certificates and letters which are marked exhibits "A" to "G" were presented with a view to corroborate the statements made by the subscribers thereof. Almost all the certificates and letters referred to do not state that the repairs cannot be made in the Islands. To substantiate, in the letter dated October 9, 1924, of Mr. Carlos Pombo, Marine Surveyor, to Ynchausti & Company, it is stated in part:

> "* * * por hoy es imposible efectuar en Felipinas las citadas obras; pues los talleres existentes *son completos para reparaciones de cascos, maquinas, ejes, y calderas*, pero por ningun concepto para la construction de dichos organos, por carecer de elementos para estos trabajos." (See Exhibit "D.")

Mr. Pombo did not state that the repairs could not be done in the Philippine Islands; his statement is merely to the effect that construction of the boiler, cylinder and thrust shaft is not possible, but repairs thereof can be made in the Islands. Again, at the hearing, in answer to the third question propounded to him, he said: "As I say in the certificate, the boiler, the cylinder and the thrust shaft could not be made in the Philippine Islands, although the rest of the work could have been done." In plain language, the only thing impossible to be effected in the Philippine Islands is the construction of the parts enumerated, but as far as the repairs are concerned, it is manifest from the said statement that they could be made in the islands. (See page 2 of the minutes of the hearing held on October 27, 1924.)

Exhibit "B" which is attached to the records of the case and which purports to be a true copy of a letter of the Earnshaws Docks and Honolulu Iron Works, addressed to Mr. Mariano Yengko, acting as Marine surveyor for Ynchausti & Company, under date of February 18, 1924, contains the following: "We are, however, fully equipped with a powerful derrick for removing the

old boiler and locating the new one in its place, and with all the necessary equipment for its installation and all kinds of *necessary repairs*, and should you so desire, we shall be very glad to do the installation." Subsequently, that is, on October 10, 1924, after the return of the S. S. "Venus" from Hongkong already in a repaired condition, the Earnshaws Docks and Honolulu Iron Works, sent a letter to Messrs. Ynchausti & Company stating that "our shops have no adequate facilities to make the H.P. cylinder and thrust shaft with thrust-blocks which were required for the above-named vessel." Nowhere in this subsequent letter does a statement appear that the repairs could not be made in the Philippine Islands. Moreover, at the hearing, Mr. Tomas Earnshaw, testifying in representation of the Earnshaws Docks & Honolulu Iron Works, in reply to the following question: "With the exception of these main parts of the engine, could the other work have been carried out here?" said: "Yes." In other words, he does not deny that part of the work made, presumably the repairs could have been performed in the Philippine Islands. Another witness, Mr. C. B. Nelson, Marine Surveyor, gave his testimony as follows: "Q. From what you have observed, was there any vessel of the size of the S. S. 'Venus' that was reconstructed or generally repaired in the Philippine Islands? A. Not to the same extent as the S. S. 'Venus'." In other words, there have been other ships of the size of the S. S. "Venus" which were repaired, but such repairs were not to the same extent or in the same proportion as those made on the S. S. "Venus." Lastly, Mr. Baxter, the Supervising Inspector of Hulls and Boilers of the Bureau of Customs, who was also required to testify at the hearing, was asked the following question: "Mr. Baxter, from your experience, could you tell whether all the work carried out on the S. S. 'Venus' could have been done in the Philippine Islands?" The answer was: "Not all." What could the expression "not all" mean in this case? It can only mean that part of the repairs could have been done in the Philippine Islands and part of the same elsewhere. As a resume of all the testimony afforded, it is safe to conclude that part of the work in the reconstruction of the S. S. "Venus" could have been successfully made in the Philippine Islands.

That the decision as rendered is manifestly against the provisions of law involved can be readily deduced from a careful perusal of the pertinent provisions of the Tariff Law, as well as the decisions of the Supreme Court in the cases of Fernandez Hermanos vs. Collector of Customs, (30 Phil. 50) and Gutierrez Hermanos vs. Collector of Customs, (39 Phil. 876). The Tariff Act of 1909 provides:

> "Section 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph.
>
> * * * * *
>
> "348. Repairs to vessels documented in the Philippine Islands or regularly plying in the Philippine waters, made in foreign countries, upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands."

The above-quoted provisions of the Philippine Tariff Act had been interpreted in the Fernandez Hermanos case to mean that the repairs are considered a unit in themselves and not severable. In other words, "the repairs referred to in the statute are to be regarded as a whole," in that "repairs made in a foreign port at one time to a single ship cannot be divided into (a) those which could have been made in the Philippine Islands, and (b) those which could not (have been made in this country), and duty levied on that portion which could have been made here." This theory, in plain terms, has been the one followed to the utmost in the decision under request for reconsideration, but it should be borne in mind that in the case of Gutierrez Hermanos vs. the Collector of Customs already referred to, which was promulgated subsequent to the Fernandez Hermanos case, the Supreme Court, speaking through Mr. Justice Malcolm, ruled: "The principles announced in the decision of the Supreme Court in the case of Fernandez Hermanos vs. the Collector of Customs (1915) which appears to have been carried to the utmost limit by this opinion (in the Fernandez Hermanos case) should not be extended so as to include thereunder cases that the law did not contem-

plate." The latter decision which holds the rule contrary to that enunciated in the Fernandez Hermanos case, in that repairs are *divisible*, and which confirms the proposition that the repairs that could have been performed in the Philippine Islands are taxable, states: "If the *parts* and *pieces* necessary for the repair of ships can be obtained in other ports and installed in the Philippine Islands, the protective aims of the Tariff Law are fulfilled. If, however, a shipowner can on the slightest excuse have one small part made in a foreign port in order to have all the repairs made there, then the intent of the Legislature is frustrated." As it has been clearly proven in the arguments supporting the first ground for this request for reconsideration of the decision that part of the repairs made on the S. S. "Venus" could have been performed in the Philippine Islands, it, therefore, follows as a necessary consequence, and in line with the doctrine enunciated in the latter case of Gutierrez Hermanos vs. the Collector of Customs that customs duties should be assessed on those repairs which could be made in the Islands instead of ordering the refund of the whole amount of the duties collected. It is very clear that the decision in the case of Fernandez Hermanos cannot be relied upon as it is repugnant to the decision rendered in the case of Gutierrez Hermanos. Under the rules of statutory construction, the latter doctrine being of recent date, should be held binding upon subsequent similar cases. On the strength of the principles laid down by the Supreme Court in the case of Gutierrez Hermanos, Protest No. 14061 should not have been sustained.

In view of the foregoing, it is earnestly requested that the decision as rendered in Protest No. 14061 of Messrs. Ynchausti & Company, ordering the refund of the whole amount of customs duties collected on entry No. 31654-A, Voucher No. 39138, be reconsidered in order to be consistent with the facts adduced at the hearing as corroborated by the documentary evidence presented, as well as to be in harmony with the jurisprudence reference to which has repeatedly been made.

Respectfully,

(Sgd.) BEN F. WRIGHT,
Insular Auditor.

Certified copy,
(Sgd.) NAZARIO NADURATA.

EXHIBIT "E"

November 7, 1924.

The Honorable,
The Secretary of Finance,
Manila.
Sir:

I have the honor to enclose herewith a copy of our letter to the Insular Collector of Customs, dated November 6, 1924, requesting for reconsideration of the decision rendered on Protest No. 14061, filed by Messrs. Ynchausti & Company, against the action of the Insular Collector of Customs, acting as Collector of Customs for the Port of Manila, as to the assessment and collection of duty on the cost of the repairs made on the S. S. "Venus" at the Port of Hongkong.

In the event that the decision of the Insular Collector of Customs on reconsideration be still adverse to the Government, and if the views of this office as embodied in the letter requesting for reconsideration of the original decision are concurred in by the Honorable, the Secretary of Finance, it is requested that the case be removed to the Court of First Instance in the city of Manila for review, under the provisions of section 1386 of the Administrative Code. The original decision of the Insular Collector of Customs was rendered on October 31, 1924, and under the said section of the Administrative Code, the time within which the case may be removed to the Court for review at the instance of the Secretary is limited to fifteen days after the receipt of a copy of the decision.

Respectfully,
(Sgd.) BEN F. WRIGHT,
Insular Auditor.

EXHIBIT "F"

2nd Indorsement
November 12, 1924

Respectfully forwarded to the Honorable, the Secretary of Finance, inviting attention to the within memorandum of the Superintendent, Marine Railway and Repair Shops, Bureau of Commerce and Industry, which shows that all the repairs made on the S. S. "Venus" at

the Port of Hongkong could have been done by the Earnshaws Docks and Honolulu Iron Works and the Varadero de Manila with the exception only of the manufacture of a new boiler, five winches and thrust shaft, but which can be ordered abroad and installed here in Manila as these docks have facilities to install the said boiler, five winches and thrust shaft. This memorandum gives another reason besides those enumerated in our letter to the Insular Collector of Customs dated November 6, 1924, requesting for reconsideration of the decision rendered on Protest No. 14061, copy of which was sent to that Department under our letter of November 7, 1924, for removing the case to the Court of First Instance in the City of Manila for review under the provisions of section 1386 of the Administrative Code.

The Insular Collector of Customs has not as yet rendered any decision on our request for reconsideration, and since the time within which the Secretary can order the removal of the case to the Court for review will expire on November 14, 1924, it is requested that prompt action on this matter be taken.

There are also inclosed herewith copies of letters that were received by this office from the Atlantic, Gulf and Pacific Company and the Pacific Mail Steamship Company. The first letter shows that the work which the Earnshaws Docks and Honolulu Iron Works claimed that they could not do, namely, the lifting of a boiler weighing approximately 32 tons, could have been done by the Atlantic, Gulf and Pacific Company, and the second letter shows that a boiler weighing 32 tons could have been brought into the Philippine Islands by a vessel of the Pacific Mail Steamship Company.

(Sgd.) BEN F. WRIGHT,
Insular Auditor.

EXHIBIT "G"

November 14, 1924.

The Insular Collector of Customs,
Manila, P. I.

Sir:

In connection with our request of November 6, 1924, for reconsideration of the decision rendered on Protest 14061, I am enclosing you herewith copies of communications which corroborate the correctness of the asser-

tion made in your letter to Messrs. Ynchausti & Company on March 13, 1924, before the S. S. "Venus" was taken to Hongkong, to the effect that in the Philippine Islands there are adequate facilities to carry out the repairs intended to be made and which were in fact made on the S. S. "Venus" at the Port of Hongkong, in view of which those parts of the vessel that could not be manufactured in the Philippine Islands should be imported and installed here in order to permit the Tariff Act to attain its protective aim. Particular attention is called to the memorandum of the Superintendent, Marine Railway and Repair Shop, Bureau of Commerce and Industry, which indicates that the repairs made on the S. S. "Venus" could have been done by the Earnshaws Docks and Honolulu Iron Works and the Varadero de Manila. The letters of Messrs. Smith, Bell & Company, Ltd., and the Pacific Mail Steamship Company state that a boiler weighing 32 tons can be imported into the Philippine Islands from abroad, and the letter of the Atlantic, Gulf & Pacific Company shows that the lifting of a boiler weighing 32 tons, which Mr. Tomas Earnshaw of the Earnshaws Docks and Honolulu Iron Works claimed that their derrick could not have performed, could have been done by the Atlantic, Gulf & Pacific Company.

The interest of the Government demands a careful consideration of the evidence herein presented, which to our point of view is sufficient to overthrow the claim of the protestants, Messrs. Ynchausti & Company, in this case, that adequate facilities to undertake the repairs made on the S. S. "Venus" at the Port of Hongkong do not exist in the Philippine Islands, and therefore, the cost of the repairs should be exempted from the payment of the import duties in accordance with the provisions of the Tariff Act.

Respectfully,
(Sgd.) BEN F. WRIGHT,
Insular Auditor.

EXHIBIT "H"

BUREAU OF AUDITS

Manila, November 28th, 1924.

The Customs Cashier,
Manila.

Your attention is invited to your Warrant No. 210175 returned herewith informing that no action thereon can

be taken by this office until after the request of the Insular Auditor for reconsideration of the decision on Protest No. 14061 is decided upon by the Insular Collector of Customs.

Return of this communication together with the attached vouchers or papers and the note of action taken within the period of 10 days is requested.

(Sgd.) A. HERNANDO,
For the Superintendent, Audits Division,
Department of Insular Audits.

Certified copy:
(Sgd.) NAZARIO NADURATA.

EXHIBIT "I"

BUREAU OF CUSTOMS
MANILA

1st Indorsement
November 26, 1924

Respectfully returned to the Insular Auditor, Manila, with the information that this office finds no justification for reconsidering its decision of October 31, 1924.

(Sgd.) V. ALDANESE,
Insular Collector of Customs.

EXHIBIT "J"

The Government of the Philippine Islands
Bureau of Audits
Manila

December 31, 1924.

The Insular Collector of Customs,
Manila, P. I.

Dear Sir:

I am returning herewith without counter-signature, your Warrant No. 210175, drawn in favor of Ynchausti & Company, for the sum of P159,962.00, being a refund of import duty and customs stamps, entry No. 31654-A, Protest No. 14061.

After a very careful consideration of all of the evidence in connection with this case, I am convinced that your decision to refund to Ynchausti & Company the sum in

question is not justified. It is apparent from the facts submitted that all of the repairs to the S. S. "Venus" could have been satisfactorily effected in Manila, with the exception of the construction of the boiler, the cylinder and the thrust shaft, and that these articles could have been imported to the Islands, and installed in Manila. It is, therefore, obvious, under the decision in the case of Gutierrez Hermanos vs. Collector of Customs, that it was your duty to have assessed and collected a duty upon all of the repairs other than those above specifically mentioned. It is requested, therefore, that the case be again reviewed by you, with the idea in view of assessing and collecting duties as above suggested.

In this connection, this office holds that a decision of the Collector of Customs, such as the one in question, is not final and conclusive upon this office. Section 24 of the Organic Act provides for "the appointment of an Auditor who shall examine, audit, and settle all accounts pertaining to the revenues and receipts, from whatever source, of the Philippine Government and of the provincial and municipal governments of the Philippines, including trust funds and funds derived from bond issues." The same section also provides that "the administrative jurisdiction of the Auditor over accounts, whether funds or property, and all vouchers and records pertaining thereto, shall be exclusive;" and further, that "the decision of the Auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned, within one year, in the manner hereafter prescribed."

In support of the position taken, that the decision of the Collector of Customs is not binding upon this office, permit me to quote from the decisions of the Comptroller of the United States, Lawrence, 1880, Vol. I, pages 534-548:

> "The usage of the Treasury Department supports the position that the allowance of a claim by the Commissioner could in no case oust the jurisdiction of the accounting officers. (Savings Bank case, ante, 194; Bender's case, ante, 339.) Such allowance, as said by Hon. F. French, Assistant Secretary of the Treasury, is "a mere step in the system of internal revenue laws," and "the decision of the Commissioner of Internal Revenue is not made final or con-

clusive by any statute; but it was clearly within the province of the Comptroller in this case to decide whether the opinion of the Commissioner of Internal Revenue was not correct both in law and fact." (House Ex. Doc. No. 27, 2d sess. 45th Cong., p. 43.)

* * * * *

"A claim for the refunding of internal-revenue tax is a claim or demand against the United States. Section 236 of the Revised Statutes provides that—

> " 'All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.'

"The Auditors and Comptrollers, and they only, are charged with the duty of executing the provisions of this section. (Rev. Stats., Title VII, Chaps. 3, 4.) Their action on claims and accounts is exclusive of that of any other executive officers, and is conclusive upon the executive branch of the Government. (Rev. Stats., 191.) These officers must, therefore, act upon an internal-revenue of refunding claim; first, because it is a demand against the United States; and, second, because the mode of payment involves the statement of an account and the certification of a balance due."

* * * * *

"The statutes require the Auditor and Comptroller to examine claims. The Comptroller then certifies the balance, if any, found due; and his certificate is made 'conclusive upon the executive branch of the Government.' (Rev. Stats., 191.) It is thus conclusive upon the President, and upon the heads of Departments, and hence also upon the Commissioner of Internal Revenue. The Statute employes very explicit language to secure this conclusive effect. If this action is conclusive on all these officers, no action of theirs can be conclusive on the Auditor and Comptroller, unless it is made so by an equally explicit statute, and there is none such in respect to internal-revenue refunding claims."

"The jurisdiction exercised by the Auditor and the Comptroller over the adjustment of the claims is a discretionary character.

"Such being its character, the action of the Commissioner of Internal Revenue is not binding upon them."

* * * * *

"An account must be stated, examined, and certified by the accounting officers for the payment of every claim which is settled in the Treasury Department. The action required of accounting officers in the settlement and adjustment of claims and accounts is, as has already been shown by the statutes and decisions of the courts, and more particularly in Watkins vs. the United States, discretionary in the highest degree. They are presumed to state the account according to the law and the facts in each case; to admit credits which, in their judgment, are correct, and to reject all credits and claims which, in their opinion, are illegal or not supported by satisfactory evidence as to the facts alleged by the claimant or debtor."

Again in the decision of the United States Comptroller, Volume VI, page 263, the following ruling of the Court of Claims is cited:

"In the case of Dugan v. United States decided by the Court of Claims June 5, 1899, the question of the conclusiveness of an allowance by the Commissioner of Internal Revenue for a refund of a tax erroneously collected was again considered. In this case the court said:

" 'There is no contention that the allowance or awards thus made were procured by fraud, or that any mistakes in mathematical calculations exist. On the contrary, the Government's counsel insists that the decision of the Commissioner is conclusive, and therefore not open to review by either the accounting officers of the Treasury Department or the courts.

" 'The question is, therefore, had the Commissioner authority and power under the statute quoted to make the allowance or awards referred to?

" 'His decision in respect to disputed question of fact, in the absence of fraud or mistakes in

mathematical calculation, would certainly be final and not open to review, but in the absence of disputed questions of fact, where his decision involves the construction of the law under which he acts, we think a different rule applies.' "

It will be noted that the above opinions of the Comptroller relate to the Commissioner of Internal Revenue of the United States; however, as far as I am aware, the opinions quoted apply with equal force to the decisions of the Collector of Customs.

In taking this position, I desire to state that it is neither the intention or the desire of this office to question the authority of the Insular Collector of Customs, as defined in the Administrative Code or other laws, insofar as such laws are not in conflict with the Organic Act, which makes it the duty of the Insular Auditor to examine, audit, and settle all accounts pertaining to the revenues and receipts of funds, from whatever source, of the Insular Government.

The mere fact that the Administrative Code prescribes certain duties for the Insular Collector of Customs, and demands of him the interpretation and application of the laws, can in no way affect the jurisdiction of the Insular Auditor in the settlement of any claim or account before him. The very words of the law defining the powers of the Insular Auditor, which provide that his decisions shall be final and conclusive upon the executive branches of the Government, and that in the exercise of his duties, he is authorized to make investigations and to require the submission of any papers, documents and records, would certainly demand of him the questioning of any interpretation that might be placed upon the laws relating to the revenues or expenditures of the Government.

Respectfully yours,

(Sgd.) BEN F. WRIGHT,
Insular Auditor.

A certified true copy.
(Sgd.) NAZARIO NADURATA.

EXHIBIT "K"

THE GOVERNMENT OF THE PHILIPPINE ISLANDS
DEPARTMENT OF FINANCE
BUREAU OF CUSTOMS
MANILA

March 20, 1920.

Special Order No. 88.

Appointing officials of the Bureau of Customs to serve in the Board of Protests and Appeals.

Paragraph I. The following officials of the Bureau of Customs will hereafter compose the Board of Protests and Appeals:

The Insular Deputy Collector of Customs, Chairman.

The Special Agent, Administrative Division Member.

The Chief of the Marine Division, Member.

The Secretary, Board of Protests and Appeals, Member.

Par. II. In case of absence of any of the above named officers, the person serving for the time in his place and stead shall serve as a member or chairman, as the case may be, of said Board.

Par. III. All previous orders and circulars in conflict herewith are hereby revoked.

V. ALDANESE,
Insular Collector of Customs.

Certified Copy:
(Sgd.) NAZARIO NADURATA.

EXHIBIT "L"

104 Dasmarinas,
Manila.

Octubre 9, 1924.

Sres. Ynchausti & Co.,
Manila.

Muy senores mio:

Tengo el honor de acusar a Vds. recibo de su carta fecha de hoy en la que me preguntan las posibilidades de efectuar en Manila la construccion de una caldera con

cilindro y un eje de empuje para la maquina del Vapor "Venus."

Contestando a dicha pregunta puedo asegurarles que por hoy es imposible efectuar en Filipinas las citadas obras; pues los talleres existentes son completos para reparaciones de cascos, maquinas, ejes y calderas, pero por ningun concepto para la construccion de dichos organos, por carecer de elementos para estos trabajos.

Esperando nuevamente sus ordenes, es de Vds.

Atentamente,

(Sgd.) CARLOS POMBO.

Certified Copy:
(Sgd.) NAZARIO NADURATA.

EXHIBIT "M"

THE EARNSHAWS DOCKS & HONOLULU IRON WORKS

Incorporated 1912

Manila, Feb. 18, 1924.

Mr. Mariano Yenko,
Marine Inspector for
Ynchausti & Co.,
Manila.

Dear Sirs:

We are in receipt of your favor of the 12th inst., referring to the replacing of the old boiler of the S. S. "VENUS" with a new one.

We hereby certify that we are unable to construct a complete new boiler for the above vessel due to lack of proper facilities at our shops.

We are, however, fully equipped with a powerful derrick for removing the old boiler and locating the new one in its place and with all the necessary equipment for its installation and all kinds of necessary repairs, and should you desire, we shall be very glad to do this installation.

Yours very truly,
THE EARNSHAWS DOCKS & HONOLULU IRON WORKS,
By (Sgd.) T. EARNSHAW,
Manager, Marine Plant.

Certified true copy.
(Sgd.) NAZARIO NADURATA.

EXHIBIT "N"

THE EARNSHAWS DOCKS & HONOLULU IRON WORKS

Incorporated 1912.

Manila, P. I., Oct. 10, 1924.

Messrs. Ynchausti & Co.,
Manila.
Dear Sirs:

We beg to acknowledge receipt of your favor of the 8th inst., with reference to the reconstruction of the S. S. VENUS.

We hereby certify that our shops have no adequate facilities to make the H. P. cylinder and the thrust shaft with thrust-blocks which were required for the above named vessel.

With reference to our letter dated February 18, 1924, wherein we mentioned that we were equipped with a derrick for removing the old boiler and locating the new one in its place, we were under the belief that the new boiler could not weigh more than 25 tons and for this reason we stated that we could have done its installation.

With reference to the last paragraph in your letter regarding stability tests, these tests can be performed by us whenever necessary.

Yours very truly,
THE EARNSHAWS DOCKS & HONOLULU IRON WORKS,
By (Sgd.) T. EARNSHAW,
Manager, Marine Plant.

Certified true copy.
(Sgd.) NAZARIO NADURATA.

On March 9, the petitioner filed his reply memorandum.

On March 21, 1925, the Supreme Court issued the following resolution:

> "In view of the importance of the questions involved and the desirability of having them passed upon by a full court, it is ordered that case No. 23601, Ynchausti & Company vs. Ben F. Wright, etc., be again included in the July calendar for reargument."

On July 17, 1925, the petitioner filed the following petition:

(CAPTION AND TITLE OMITTED)

Now comes the petitioner in the above entitled cause, by its undersigned attorneys, and respectfully prays this Honorable Court, in consideration of the importance of the issues involved herein, to allow petitioner one hour and a half for oral argument. The hearing has been set for the 27th instant.

Manila, P. I., July 17, 1925.

Respectfully submitted,

FISHER, DEWITT, PERKINS & BRADY

By (Sgd.) F. C. FISHER

Attorneys for Petitioner.

On September 21, 1925, the Supreme Court rendered the following decision:

(CAPTION AND TITLE OMITTED)

DECISION

JOHNS, J.:

STATEMENT

After the formal allegations, the petitioner alleges that it is the agent and operator of the steamship VENUS which is used in the coastwise trade of the Philippine Islands. That between February 12 and September 16, 1924, and because there were no adequate facilities in the Philippine Islands, it caused certain heavy repairs and reconstruction work to be done in Hongkong at a cost of $300,004.90, Hongkong Currency. That upon the return of the steamer to the Philippine Waters, about October 20, 1924, the Insular Collector of Customs of Ma-

nila levied the customs duty payable on such repairs and reconstruction work at P159,960.00, and made a demand for its payment. That on October 24, 1924, the petitioner paid the money under protest, claiming that such repairs and work were exempt from the payment of customs duty under Paragraph 200, Section 8, and Paragraph 348, Section 11, of the Philippine Tariff Act of 1909. That on October 31, 1924, and after an official hearing by him, the Insular Collector of Customs rendered a decision sustaining the protest, and ordered the refund of the money. That copies of the decision were immediately transmitted to the Secretary of Finance and to the defendant Auditor. It is then alleged that the Secretary of Finance failed, within fifteen days, to certify that in his opinion, the decision ought to be revised by the Court of First Instance of the City of Manila, or to order its removal, by reason of which the decision of the Collector of Customs has become and is now final and conclusive upon the Government of the Philippine Islands, as provided in Section 1383 of the Administrative Code. That on November 6, 1924, the respondent, without any authority, addressed a letter to the Insular Collector of Customs asking him to reconsider his decision, and the Insular Collector of Customs denied the request, and affirmed his decision of October thirty-first. That on November 26, 1924, the Insular Collector of Customs drew and signed a warrant for the refund of the import duty, and that the defendant wrongfully and unlawfully refused to do so, and still refuses to countersign the warrant. That the petitioner has no plain, speedy and adequate remedy at law, and it prays for a peremptory writ of mandamus directed to the defendant to countersign the warrant.

For answer, the defendant admits the allegations made in paragraphs 1, 2, 3, 4, 6, and 8 of the petition, and denies all and singular allegations contained in paragraphs 5, 7, 9, 10, 11 and 12, with the exception of those which

in his further defense may be expressly admitted, and, as a special plea, alleges that the steamship VENUS, owned and operated by the petitioner, is a steam vessel, whose tonnage, gross and net, at the time of the repairs, were 987.64 and 597.74, respectively. That prior to February, 1924, the steamship needed certain repairs. That notwithstanding the existence and availability of adequate facilities in the Philippines, the petitioner caused the repairs to be made in Hongkong. That upon the arrival of the steamer, the Insular Collector of Customs of Manila made the assessment in question, which was paid under protest. That on October 31, 1924, the Insular Collector of Customs sustained the petitioner's protest, and ordered the refund of the money, and that on the same day the defendant received a copy of the decision. That, notwithstanding the protest of the petitioner, the money in question, upon being paid to, and received by, the Collector of Customs, was covered into the Insular Treasury of the Philippine Government, and became a part of the general unappropriated funds, in accord with Section 14, Chapter III, of Act No. 2935. It is then alleged "that to meet refunds of customs duties or taxes erroneously and illegally collected by the Philippine Government, permanent annual appropriations are provided by Act No. 357, as amended by Act No. 1515." "That the duty and responsibility to examine, audit, settle and revise all accounts and claims for refund of customs duties rest solely and exclusively with the respondent Insular Auditor." That at once, upon the receipt of the decision of the Collector of Customs, the defendant, pursuant to the powers and duties invested in him by law, caused inquiries and investigations to be made, to ascertain and verify the correctness and veracity of the claim that the repairs could not have been made in the Philippine Islands, for the purpose of determining whether the refund by the Collector of Customs, or the payment for which credit is claimed was actually to be made for ob-

jects or purposes authorized by Act. No. 357, as amended by Act No. 1515. That on or about November sixth, the defendant, being convinced that adequate facilities for the repairs were afforded, and conscious of the duties and responsibilities invested in him by the Jones Law, wrote a letter to the Insular Collector of Customs, requesting a reconsideration of his decision on the protest, on the ground that it was openly and manifestly contrary to the weight of the evidence in this case, and to the provisions of Paragraph 200, Section 8, and Paragraph 348, Section 11, of the Philippine Tariff Act of 1909. That on November seventh, the defendant wrote the Secretary of Finance furnishing him with a copy of the letter to the Collector of Customs, and requested the Secretary of Finance to have the decision of the Collector of Customs reviewed by the Court of First Instance of the City of Manila, in the event that the Collector refused to reconsider his decision. That on November twelfth the defendant, having obtained additional evidence, as a result of his investigation and inquiry, reiterated to the Secretary of Finance his request to have the cause removed to the court for review, reminding him that the period within which the removal should be made would expire on November 14, 1924. That on November 14, 1924, the defendant addressed another letter to the Collector of Customs furnishing him with additional written proof, and again requesting him to review his decision. That his letters to the Secretary of Finance of November seventh and twelfth and to the Collector of Customs of November sixth and fourteenth were never answered. That on November 26, 1924, the Collector of Customs presented to the defendant, for counter-signature, the warrant in question in favor of the petitioner for the payment of the claim which was styled for the payment of petitioner's claim for the refund of the import duty, entry No. 316654-A, Protest No. 14061. That on November 28th, the defendant returned the warrant,

and informed the Collector of Customs that no action could be taken until after the request of the respondent for a reconsideration of the decision had been passed upon by him. That on the same day, the Insular Collector of Customs returned defendant's request for a reconsideration, "stating that he finds no justification for reconsidering his decision of October 31st, 1924, on said Protest No. 14061." That the time the petition was filed in this Court, the defendant had not yet finally decided whether he would approve or countersign the warrant.

As a further and separate defense, it is alleged that this Court has no jurisdiction of the subject-matter, and that the petitioner has another plain, speedy and adequate remedy in the ordinary course of law.

As a part of his answer, the defendant attached to the record a transcript of all the evidence taken by the Collector of Customs at the hearing on the protest and his decision upon such hearing, together with a copy of all the correspondence between the defendant and the Collector of Customs and the Secretary of Finance, and the defendant prays that the suit be dismissed.

To this answer, the petitioner filed a general demurrer upon the ground that it does not state facts sufficient to constitute a defense, and that is the question now before this Court.

JOHNS, J.:

By the pleadings, the following facts are admitted:

First. That at the times alleged the plaintiff was the owner of the steamship VENUS. That it was taken to Hongkong, and that repairs and overhauling charges were made upon the boilers and thrust shaft, which, in round numbers, cost $300,000.00 in Hongkong money;

Second. That on the return of the vessel to Manila, the owners were forced to, and did, pay P159,960.00 as a condition precedent to the docking of the vessel in Philippine waters;

Third. That the money was paid under a duly written protest and upon which the petitioner legally demanded a hearing. That a hearing was duly had upon which evidence was taken, based upon which the Collector of Customs rendered a decision sustaining the protest, and ordering a refund of the money, and that such decision has become and is now final; and

Fourth. That based upon, and in accord with, the decision the warrant in question was drawn and signed by the Collector of Customs and forwarded to the defendant for his signature, who then and ever since has refused to sign it.

Upon such admitted facts, the petitioner contends that the signing of the warrant is a matter over which the Auditor has no discretion, and that his duties are ministerial only.

The defendant contends that he is not legally bound by the decision of the Collector of Customs, and that the signing of the warrant is a matter in his discretion. That this court has no jurisdiction of the subject-matter; and that the petitioner has a plain, speedy and adequate remedy at law. That the money has been paid over to the Government Treasury, and that for such reasons mandamus will not lie.

The decision of the Collector of Customs is as follows:

"Protest No. 14061.

"DECISION.

"This protest is against the assessment of duty on cost of repairs made at Hongkong to the steamship 'Venus' of Ynchausti & Co., Manila, under paragraph 200 of the Philippine Tariff Act of 1909 at fifty per centum ad valorem instead of exempting the same from duty by virtue of the provisions of paragraph 200 and 348 of the said Tariff Act.

"The only question to be considered in this case is whether the repairs are entitled to free duty or not, or whether adequate facilities exist in the Philippine Islands

for carrying out such repairs or not. In order to give the protestants an opportunity to prove their claim, a hearing was held on October 27, 1924, and the following evidence was produced:

"A letter of Fernandez Hermanos to Mariano Yenko, Marine Surveyor, acting as Marine Superintendent for Ynchausti & Co., dated March 8, 1924, in which the former state that they cannot construct a boiler for the S. S. 'Venus' (Exhibit 'A').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Mariano Yenko dated February 18, 1924, stating that they are unable to construct a new, complete boiler, but that they have a powerful derrick to remove the old one and place a new one (Exhibit 'B').

"A letter of the Earnshaws Dock and Honolulu Iron Works to Ynchausti & Co., dated September 25, 1924, informing the latter that the maximum lifting capacity of their floating derrick is 25 tons (Exhibit 'C').

"A letter of Carlos Pombo to Ynchausti & Co., dated October 9, 1924, advising that it is impossible to construct a boiler with cylinder and a thrust shaft for the 'Venus' in the Philippines (Exhibit 'D').

"A letter of the Earnshaws Docks and Honolulu Iron Works to Ynchausti & Co., dated October 10, 1924, certifying that their shops have no adequate facilities to make H. P. cylinder and thrust shaft with thrust blocks for S. S. 'Venus.' They also correct the statement contained in their letter of February 18, 1924, Exhibit 'B,' to the effect that they have found out that the 'Venus' boiler is too heavy for their derrick (Exhibit 'E').

"A certificate of the Hongkong & Whampoa Dock Co., Ltd., stating the weights of the component parts of the boiler built by the same for the 'Venus' (Exhibit 'F').

"A letter of C. B. Nelson, Marine Surveyor, to Ynchausti & Co., dated October 15, 1924, stating that no vessel of the size of the S. S. 'Venus' has been reconstructed at this port and has 'such extensive repairs carried out,' and that the main boiler and thrust shaft could not be made at Manila (Exhibit 'G').

"The statements contained in the above letters and certificates have been confirmed by the parties subscribing the same, at the hearing, and have been corroborated by the Chief of Hull and Boiler Division of this Bureau. The lack of adequate facilities is, therefore, clearly established and the undersigned is convinced that the repairs to and reconstruction of the Steamship 'Venus' could not be effected in the Philippine Islands.

"This case is identical with that of Fernandez Hermanos vs. the Insular Collector of Customs (R. G. No. 8667, Vol. 30, page 50, of the Philippine Reports) and the decision thereon applies hereto.

"Protest No. 14061 is, therefore, for the foregoing reasons, sustained and a refund of the customs duty collected is ordered to the protestants.

(Sgd.) "V. ALDANESE,
"Insular Collector of Customs."

The decision of Fernandez Hermanos vs. Collector of Customs above cited was rendered on March 6, 1915, and was based on the following statute:

> "Sec. 8. That the rates of duties to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said Islands from the United States or any of its possessions except as otherwise provided in this Act shall be as follows:
>
> * * * * *
>
> "200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem.
>
> "*Provided*, That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act:
>
> "Sec. 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which

shall be prescribed in accord with the provisions of each paragraph:

* * * * *

"348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, upon proof satisfactory to the Collector of Customs that adequate facilities for such repairs are not afforded in the Philippine Islands." (Tariff Act.)

It was there held that:

"(1) Facilities are not adequate unless, when required, all of the repairs necessary for the safe, convenient and economical operation of the ship can be made by the use of such facilities. (2) If all of the repairs necessary for the safe, convenient and economical operation of the ship cannot be made in the Philippine Islands, then, if made in a foreign port, they may come into the Philippine Islands free of duty. (3) The repairs referred to in the statute are to be regarded as a whole; and the repairs made in a foreign port at one time to a single ship cannot be divided into (a) those which could have been made in the Philippine Islands and (b) those which could not, and duty, levied on that portion which could have been made here."

This decision was followed by Gutierrez Hermanos *vs.* Collector of Customs, 39 Phil., 876, in which this Court, among other things, said:

"Another phase of the Fernandez Hermanos case indicative of a difference between the facts in that case and those before us concerns the weight which the courts should give to the findings of the Insular Collector of Customs. The next to the last paragraph of the Fernandez Hermanos decision reads:

" 'The question of the control of the discretion of the Collector of Customs under the tariff law in determining whether or not there are adequate facilities in the Philippine Islands for the repair of a given ship is not involved in this case, inasmuch as it is admitted and the Collector has found that there

were not adequate facilities in the Philippine Islands for the repair of the ship involved in the case, he declaring that some of the most important repairs could not be made here at all.'

"The next to the last paragraph of the decision of the Insular Collector of Customs in the case before us reads:

" 'This Office is therefore of the opinion and so decides, that there were adequate facilities in the Philippine Islands for doing all of the repair job in question to the steamship *Magellanes* and that all the repairs done upon said vessels in Hongkong cannot be admitted duty free merely upon the showing that a single piece or part, used in making such repairs, could not be manufactured in the Philippine Islands, in the absence of a showing to the effect that reasonable diligence had been used to obtain the part required.'

"In the first case, therefore, the ruling of the Insular Collector of Customs and such as not to involve any reference to the home facilities for repairs, while in the second case he has made an express finding to the effect that upon proof satisfactory to him adequate facilities for the repairs are afforded in the Philippine Islands. In line with the repeated decisions of the courts, the confidence which the law imposes in the judgment of the Collector of Customs should not be unduly interfered with by the courts and the same shall be taken as *prima facie* controlling unless there is clear proof of abuse of discretion. Abuse of discretion by the Insular Collector of Customs is not established."

After the latter decision was rendered, the Philippine Legislature, under the authority conferred by Section 10 of the Jones Law, enacted Act No. 2872, approved November 24, 1919, amending the above quoted provisions of Paragraph 200, Section 8, of the Tariff Law of 1909, to read as follows:

"SECTION 1. Paragraph two hundred of section eight of the Act of Congress of the United States of August fifth, nineteen hundred and nine, entitled 'An Act to raise revenue for the Philippine

Islands, and for other purposes,' is hereby amended to read as follows:

"GROUP 4.—Boats and other water craft.

"200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade and plying usually in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem until December thirty-first, nineteen hundred and twenty-four; twenty-five per centum ad valorem on and after January first, nineteen hundred and twenty-five.

"*Provided,* That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, so that the work can not be done there reasonably, economically and within reasonable time, in the judgment of said collector, such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act."

The purpose and intent of the amendment is very apparent. It leaves the whole question to the discretion of the Collector of Customs as to whether or not the work and repairs on a vessel can be done in the Philippine Islands "reasonably economically and within a reasonable time." This act, as amended, was put into legal force and effect by a proclamation of date December 11, 1919.

Among other things, the Administrative Code provides:

"Sec. 1384. *By whom cause may be removed into court.*—The removal of a cause into court may be had at the instance of the protesting party or, in case of seizure, at the instance of the owner or agent of the seized property. If the decision of the Insular Collector is adverse to the Government the cause may also be removed in the manner hereinafter specified, by order of the Department Head.

"Sec. 1386. *Removal upon order of Department Head.*—Upon making any decision which may be removed upon the order of the Department Head,

the Insular Collector shall immediately transmit a copy of such decision to him and also the Insular Auditor; and if within fifteen days thereafter the Department Head shall certify that in his opinion the decision ought to be revised by the Court of First Instance in the city of Manila, it shall be the duty of the Insular Collector, upon notification thereof, to transmit the original record to said court in the same manner as upon removal by a party other than the Government.

"Sec. 1383. *Review in Court of First Instance.*— The party aggrieved by the decision of the Insular Collector in any matter brought before him upon protest or by his action or decision in any case of seizure may procure the cause to be removed for review into the Court of First Instance sitting in the city of Manila, in the manner and within the period hereinafter prescribed.

"Unless the property party in interest shall procure the cause to be thus removed into court for review, the action or decision of the Insular Collector shall be final and conclusive against him."

No appeal was ever taken from the above quoted decision of the Insular Collector of Customs, and, as such, it has become and is now final, although it is but fair to say that the defendant requested a reconsideration of the decision, and sought to have an appeal taken from it to the Court of First Instance, which was not done.

Conceding that all of such facts are true, the defendant contends that, notwithstanding such express provisions of the statute, under the terms and provisions of the Jones Law, and as Insular Auditor, he yet has supervision and a discretionary power over such matters, and to that extent and in that particular, the provisions of the Jones Law are superior to, and should prevail over, the provisions of Act. No. 2872.

Section 24 of the Jones Law provides that the Insular Auditor shall:

"a) '* * * examine, audit and settle all accounts pertaining to the revenue * * * of the Philippine Government. * * *;' and

"b) '* * * audit in accordance with law and administrative regulations, all expenditures of funds * * * pertaining to * * * the Government.'"

By the language of the act, the defendant is authorized to "audit, examine and settle accounts." As to the "expenditures of funds pertaining to the Government," he is authorized to "audit in accordance with law and administrative regulations."

It will be noted that the words "examine" and "settle," which are included in, and made a part of, paragraph (a) are omitted in paragraph (b). This is significant.

In the case of Powers *vs.* United States, 18 Court of Claims, 275, it is said:

"An account is something which must be adjusted and liquidated by arithmetical process."

Words and Phrases, Volume 1, page 87, says:

"An account is a list of statement of monetary transactions, such as payments, losses, sales, debits, credits, etc., in most cases showing a balance or result of comparison between items of an opposite nature, e. g., receipts and payments.

"An 'account' is a detailed statement of items of debit and credit, or of debt arising out of contracts between parties.

"A computation or statement of debts and credits arising out of personal property bought or sold, services rendered, material furnished, and the use of property hired and returned.

"An account is defined to be a detailed statement of mutual demands in the matter of debt and credit between parties, arising out of contracts or some fiduciary relation."

Page 89:

"The word 'account' is a word of wide and varied signification. An account in its most general mean-

ing is a reckoning or a statement of items or details. It is not necessary that there should be * * * items on both sides, for there may be a long account of sales of merchandise, or of materials furnished, embracing only the items of the merchandise delivered or of the work done.

"The term 'account' involves the idea of debit and credit. The particular mode of keeping the account, whether on books or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different forms, is unimportant."

Page 90:

The stating of a single demand, the amount and validity of which has become unalterably fixed, is not an account within the meaning of Comp. St. 1897, c. 18, sec. 23, requiring the board of county commissioners to examine and settle all "accounts."

In the instant case, there was only one item which grew out of one transaction, and the only question involved was the legality of the claim. Hence, petitioner's claim was not an account within the definition of the word.

In Words and Phrases, Volume 1, page 639, it is said:

"The word 'audit' means to examine and adjust."

Page 640:

"To audit is to examine an account, compare it with the vouchers, adjust the same, and to state the balance, by persons legally authorized for the purpose.

"To audit an account is to examine and digest it, or examine and verify it, or examine and adjust it. In actual practice to audit an account is to see that the accountant is charged with everything with which he is justly chargeable, and that nothing is placed on the credit side of the account for which he is not justly entitled to credit; and then, after the

debit and credit are thus made up, to ascertain the balance remaining in his hands. In re Heath's Estate, 33 Atl. 46, 47, 52 N. J. Eq. (7 Dick.) 807."

The language in paragraph (b), to "audit in accordance with law and administrative regulations" means what it says. In other words, the "audit" should be made as the law and the administrative regulations provide. That is to say, where the law itself has made the "audit," or the administrative regulations have made the "audit," the "audit" so made should be followed and approved.

Applying that rule in the instant case, the duties of the Insular Auditor were confined and limited to—

"1. Ascertain that the protested claim has in fact been made;
2. That the protest was made within due time;
3. That no appeal has been taken from the decision and that it is, therefore, final;
4. That the amount for which the warrant is drawn corresponds to the amount paid under protest;
5. That there is money available in the treasury with which to meet the payment;
6. That the claim is one for refund of duties on repairs made abroad."

Again, the original statute, requiring proof satisfactory to the Collector of Customs that adequate facilities for repairs to vessels are not afforded in the Philippine Islands, is found in the Philippine Tariff Law of 1909, and in accord with the repeated decisions of this Court, the provision in question was included in, and is a part of, the organic law of the Philippine Islands. The subsequent amendatory law, Act No. 2872 of the Philippine Legislature was enacted by the Legislature November 24, 1919, pursuant to the authority granted it by Section 10 of the Jones Law, three years after the Jones Law was enacted. This amendatory act, since it related

to the tariff, required the approval of the President of the United States, and was given such approval by Proclamation dated December 11, 1919. The provisions of the Administrative Code of 1917, containing provisions of the Administrative Code of 1916, which the Jones Law continued in force and effect, were approved by the President on October 1, 1917. Hence, it must follow that all of the legal provisions relating to the power of the Collector of Customs are found either in laws having their origin in organic law, or which partake of the nature of organic law.

The provisions of law which confer specific powers on the Insular Auditor are found either in the Jones Law, the Act of Congress of August 29, 1916, or in the Administrative Code. As just noted, these late provisions were approved by the President. So that, as to this particular transaction, the power of the Collector of Customs, like the power of the Insular Auditor, is grounded in the organic law of the Philippines.

The case of Concepcion *vs.* Paredes, 42 Phil., 599, was decided by this Court on December 23, 1921, and it was there held:

> "1. CONSTITUTIONAL LAW; GOVERNMENT OF THE PHILIPPINE ISLANDS; THE PHILIPPINE CONSTITUTION.—The various Acts of the Congress of the United States which have been formally and expressly extended to the Philippines, especially the Act of Congress of August 29, 1916, and the Acts of the Philippine Commission and Legislature which United States Statutes have changed to organic laws, constitute the major portion of the so-called Constitution of the Philippine Islands.
>
> "2. ID.; ID.; ID.—It is beyond the power of any branch of the Government of the Philippine Islands to exercise its function in any other way than that prescribed by the organic law or by local laws which conform to the organic law.
>
> "3. ID.; ID.; ID.; POWER OF PHILIPPINE LEGISLATURE.—An Act of the Philippine Leg-

islature which has not been expressly disapproved by Congress is valid unless the subject-matter has been covered by Congressional legislation, or its enactment forbidden by some provision of the organic law. The Philippine Legislature is granted by the Organic Act, the Act of Congress of August 29, 1916, general legislative power subject to specific restrictions."

The opinion in that case was signed and approved by six members of this Court, and one member concurred in the result only, and two others reserved their votes.

What is known as the Philippine Tariff Act of 1909 is an Act of Congress, and as to the matters therein contained, it has the same legal force and effect as the Jones Law itself. The amendment to that act which was made by the Legislature of the Philippine Islands in 1919, was made in the manner and form provided by the Jones Law, and was approved by the President of the United States, and hence it is now a valid law. It follows that the law as to vessels and water crafts should not be confined or limited to the Jones Law, but should include the original Philippine Tariff Act of 1909, and the amendment to it of 1919, and the provisions of the Administrative Code above quoted. For such reasons, all of such acts should be combined and construed as one as to the law of vessels and water crafts on all questions relating to the Philippine Tariff Act.

In other words, the duties of the Insular Auditor were confined and limited to an investigation of the primary and fundamental facts as to whether a protest was duly filed and a hearing was duly had upon the protest, and that the Collector of Customs had ordered the refund of the money in question and whether there had been a compliance with all of the legal formalities concerning the protest.

By an examination of the pleadings, it will be found that all of such questions are admitted by the defendant in his answer.

In Hoey *vs.* Baldwin, 1 Phil., 551, the complaint alleged that proper certificates showing that the petitioner was entitled to receive his salary had been filed with the defendant. It was there held that:

> "The only duty which the defendant had to perform in this case was to pay the money to the plaintiff. This was a duty purely ministerial, 'which the law specially enjoins as a duty resulting from' his office."

The defendant cites and relies on the case of Lamb *vs.* Phipps, 22 Phil., 456. But that case was one in which the Auditor was clearly authorized and empowered to exercise discretionary and quasi-judicial power. It involved an examination and settlement of an account, the balancing of items of debit and credit to ascertain if a balance was or was not due from Lamb to the Government, and no other Government official was empowered to settle and decide those questions.

There is a marked difference between that and the instant case on both the law and the facts. But the case of Lamb *vs.* Phipps holds:

> "Auditors and comptrollers, as accounting officers, are generally regarded as quasi-judicial officers. They perform mere *ministerial duties only in cases where the sum due is conclusively fixed by law or pursuant to law. Except in such cases, the action of the accounting officers upon claims* * * * *is not ministerial* merely but judicial and discretionary."

On principle, the case of Zobel *vs.* The City of Manila, XXIII O. G., 411, is in point. There the Court held:

> "Another reason advanced for supposing the contract for the purchase of this property to be invalid, or at least unenforcible, is that the Insular Auditor has refused to countersign the warrant for the first instalment of the purchase price; and it is insisted

for the defendant that this action on his part is conclusive against the plaintiffs. Their sole recourse, so it is claimed, is, or rather was, by way of administrative appeal from the action of the Auditor to the Governor-General. The suggestion is in our opinion without merit. The general provisions of law defining the jurisdiction and powers of the Auditor and which, if literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the Government must be considered to be qualified as regards the contract rights of persons dealing with the city by the more specific provisions declaring how and by whom contracts can be made which will be binding on it. It was not intended that the Auditor should possess a general veto power over all city contracts, and his refusal to countersign the warrant referred to is of no moment in this action to enforce the legal liability of the city."

The defendant vigorously contends that mandamus will not lie. As stated, petitioner's protest was sustained by the Collector of Customs, who rendered a decision ordering the refund of the money, and that decision is now final.

In the case of Compania Gral. de Tabacos *vs.* French and Unson, 39 Phil., 34, the opinion, on page 58, says:

"The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts.

"In considering the case before us, it is important to bear in mind that the Government is admittedly indebted to the petitioner in the definite and certain sum of P322.93. No action, either administrative or judicial, is therefore necessary to fix this liability upon the Government. In so far as legal liability can result from governmental activities, liability exists and upon the demurrer is admitted. Furthermore, said liability is such that it should be absolved by a warrant drawn by the Purchasing Agent and countersigned by the Insular Auditor. The law makes provision for the payment of the money in this way, and it cannot otherwise be gotten out of the Insular Treasury.

"The legal remedy here indicated as proper is the writ of mandamus to compel the Purchasing Agent and the Insular Auditor to issue, countersign, and deliver the proper warrant to the petitioner. (Hoey *vs.* Baldwin, 1 Phil. Rep., 551.)

"The liability of these officers to the coercive process of mandamus arises from the fact that a valid claim exists for the payment of which provision has been made, that these officers are the appointed agents for making the payment, and that under these circumstances the execution and delivery to the creditor of the warrant are merely *ministerial* functions involving no discretionary action whatever."

On legal principle, the case of Work v. United States on the Relation of McAlester-Edwards Coal Company decided by the Supreme Court of the United States on May 21, 1923, and reported in 67 Law ed., 949, is squarely in point. The opinion was written by Chief Justice Taft, and it is there said:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. See also Work v. United States, decided March 19, 1923 (261 U. S. 352, ante, 693, 43 Sup. Ct. Rep. 389)."

Upon the admitted facts, the law fixed the liability, and defendant's duties in the countersigning of the warrant are purely ministerial.

It is argued with much force that the petitioner has a complete, speedy and adequate remedy at law in an ap-

peal from the action of the Insular Auditor to the Governor-General under the provisions of sections 653 and 656 of the Administrative Code.

That question was squarely met and decided by this Court in the case of Compania Gral. de Tabacos *vs.* French, et al., *supra*, where it was held:

> "It results that the proceedings under sections 653 to 656, inclusive of the Administrative Code (1917), are at no stage binding upon the courts, whether an administrative appeal is taken or not. The circumstance that no appeal to the Governor-General was taken by the petitioner in the instant case is, therefore, immaterial so far as the judicial solution of the controversy is concerned.
>
> "The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts."

Although that opinion was written by Justice Fisher who was then a member of this Court, and who is now counsel for the petitioner, it is worthy of note that it was unqualifiedly signed by every member of the court. That decision was rendered November 8, 1918, has never been overruled, has become and is now *stare decisis*.

Words and Phrases, Volume 1, page 182, says:

> "The term 'adequate remedy at law' means a remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Keplinger v. Woolsey (Neb.), 93 N. W. 1008, 1009.
>
> "The rule that equity will not grant extraordinary relief, as specific performance, mandamus, and the like, where there is an 'adequate remedy at law,' means a specific, adequate legal remedy competent to afford relief on the very subject-matter made the foundation of the prayer for equitable relief. An applicant for mandamus to require a public officer to perform a duty imposed on him by law has not an 'adequate remedy at law,' unless such legal remedy will require the officer to perform in effect the specific act which the law requires him to do. Babcock v. Goodrich, 47 Cal. 488, 508.

"An 'adequate remedy' which will prevent the issue of a writ of certiorari is a remedy which is equally beneficial, speedy, and sufficient; not merely a remedy which at some time in the future will bring a revival of the judgment of the lower court complained of in the certiorari proceedings, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the inferior court or tribunal. State v. Guinotte, 57 S. W. 281, 286, 156 Mo. 513, 50 L. R. A. 787."

The defendant forcibly contends that in the instant case his powers and duties are specified and defined under the following provisions of the Jones Law:

"The administrative jurisdiction of the auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive.

"The decision of the auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year, in the manner hereinafter prescribed.

"In the execution of their duties the auditor and the deputy auditor are authorized to summon witnesses, administer oaths, and to take evidence, and in the pursuance of these provisions, may issue subpoenas and enforce the attendance of witnesses, as now provided by law." (Sec. 24, Philippine Autonomy Act.)

"That any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor-General, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authorities relied on for reversing such decision." (Sec. 25, Philippine Autonomy Act.)

That, under such provisions, petitioner's remedy was by an appeal to the Governor-General, or, as therein provided, to the Secretary of War.

It will be noted that the sections above quoted do not specify that such an appeal shall be an exclusive remedy. It will also be noted that "the decisions of the Auditor shall be final and conclusive upon the executive branches of the government." It is fundamental that all governmental power is vested in the executive, legislative and judicial branches of the government, and the powers and duties of each branch are separate and distinct and clearly defined, and this law specifically says that the decisions of the Auditor shall be final and conclusive upon the "executive branches of the government." It does not say that his decisions shall be final and conclusive upon either the legislature or judiciary. The reason is very apparent. If the law had intended that the Auditor's decisions should also be binding upon the legislative and judicial branches, it would have said so. The fact that it says that his decisions shall be final and conclusive upon the "executive branches of the Government" is conclusive that in the instant case it was never the intent of the law that his decisions should be final and conclusive upon the courts. Again with all due respect to the Governor-General and the Secretary of War, it was never intended that either of them should exercise judicial functions or decide judicial questions of a civil nature. If the law did so provide, it might well be contended that it would be void and unconstitutional. The law having defined and limited the finality and conclusiveness of the decision of the Auditor to and upon the "executive branches of the government" only, it must follow that the appeal for which Section 25 provides is an appeal from a decision of the Insular Auditor which would be final and conclusive upon the "executive branches of the government" only, and that it was never intended that the provisions for such an appeal should apply to questions which are purely judicial.

It is very evident that when Congress enacted the law, it knew and understood the clear distinction between the

powers and duties of the executive and judicial departments of the Government. As to their legal meaning, the words "person" and "appeal," as used in Section 25 of the Jones Law above quoted, should be construed in connection with, and so they relate to, Section 24 *supra*. Both sections are portions of one and the same act.

It should be distinctly understood that what we have said in this opinion should be confined and limited to questions relating to vessels and water crafts arising under the provisions of the Philippine Tariff Act.

We have carefully read all of the evidence which was submitted to the Collector of Customs at the hearing on the protest. It is conclusive that the petitioner has a just and meritorious claim.

All of the persons, who were called as witnesses on behalf of the protest, were either representatives of firms or companies in the Philippine Islands that are engaged in the overhauling and repair of vessels, or who are skilled in that line of work, and who would have done the work that was done on the VENUS, if it could have been done in the Philippine Islands, all of them testified that, for want of proper equipment and facilities, it could not be done here.

To show that mandamus will not lie, the answer alleges that the money so paid under protest has since been converted into the Government's treasury, and hence is now beyond the reach of the courts. There is no merit in that contention, and it was not relied upon in the argument. The answer also alleges:

> "To meet refunds of customs duties or taxes erroneously and illegally collected by the Philippine Government, permanent annual appropriations are provided by Act No. 357, as amended by Act No. 1515."

This provision is in the nature of a permanent and continuous appropriation for the payment of claims like the one in question.

The question presented is purely one of law which involves only the legal construction of Acts of Congress and the Philippine Legislature.

One of the attorneys for the petitioner has vigorously criticised and impugned the motives of the defendant. Suffice it to say that the criticism is not an element of strength in or of petitioner's brief on the merits, and that the record is conclusive that, in refusing to countersign the warrant, the defendant was acting in good faith.

For the reasons above stated, we are clearly of the opinion that the petitioner is entitled to the writ as prayed for in its petition, and it is so ordered. Neither party to recover costs.

Ten days after the publication of this decision final judgment will be entered, and five days thereafter the record will be filed.

(Sgd.) CHARLES A. JOHNS.

WE CONCUR:

(Sgd.) RAMON AVANCENA.
(Sgd.) THOS. A. STREET.
(Sgd.) GEO. A. MALCOLM.
(Sgd.) IGNACIO VILLAMOR.
(Sgd.) NORBERTO ROMUALDEZ.

Justice Johnson dissents in separate opinion.

NOTE: Mr. Justice Villa-Real took no part in the consideration of this decision.

JOHNSON, J., dissenting, with whom Mr. Justice OSTRAND concurs:

PRELIMINARY STATEMENT

This is an original action in the Supreme Court and is, in fact, an action against the state to compel it to pay an alleged indebtedness by means of a writ of mandamus. The Collector of Customs first decided that certain merchandise was subject to an import duty under the provisions of section 8, sub-paragraph 200, of the Act of

Congress of August 5, 1909, as amended by Act 2872 of the Philippine Legislature, and collected, as duty thereon, the sum of P159,960.00. Later he decided that the merchandise should have been admitted free of duty, under section 11, sub-paragraph 348, of said Act of Congress, and issued a warrant for the repayment of said sum to the petitioner. The warrant was presented to the Auditor for his counter-signature in order to obtain the payment of said sum (P159,960.00) out of the public Treasury.

The Auditor made some investigation in the premises and as a result had some doubt concerning the admissibility of said merchandise into the Philippine Islands free of duty, whereupon he requested the Collector of Customs to make a further investigation concerning the admission of said merchandise free of duty. To that request the Collector of Customs made no reply. The petitioner demanded the payment of his claim against the state. It is a claim against the state for the reason that it is paid out of the public funds of the state. This Court has ordered that the writ of mandamus issue to compel the Auditor to authorize the payment of said alleged indebtedness in the face of the admitted facts that no such indebtedness is due and payable. In other words, this Court has substituted its judgment for that of the Auditor. Thus, one of the longest established rules of the fiscal system of the Government of the United States that, "no effectual check can ever exist in any case of accounting where the same officer authorizes the expenditure and then audits it, or controls the audits of the accounts," is violated. The fiscal system of accounting, under the laws of the Philippine Islands, does not permit an officer of the Government to create, in controversial questions, an indebtedness on the part of the Government and then order its payment without the consent of the officer (the Auditor) duly authorized to first pass upon such claim or debt.

STATEMENT OF FACTS

I regret that I cannot agree with my associates in their conclusions in the present case. So long as judges disagree on questions of fact there will continue to be disagreements on questions of law.

The facts here make it necessary to discuss and interpret and define the meaning, force and application of an Act of Congress of August 29, 1916 (39 U. S. Statutes at Large, 553). The particular sections involved are sections 24 and 25. A question of law only is presented. The facts are admitted by demurrer.

In order to have a clear conception of the question of law involved, it is necessary to know and fully understand just what the facts are. In this case they are:

First. All the facts alleged in the petition and not denied by the answer;

Second. All the facts alleged in the answer.

The facts alleged in the petition and admitted to be true by the answer are:

(a) That the petitioner is a regular collective commercial partnership, duly organized, registered and existing under the laws of the Philippine Islands, and having its principal office in the city of Manila;

(b) That the respondent is the duly appointed, qualified and acting Auditor for the Philippine Islands;

(c) That Mr. Vicente Aldanese is the duly appointed, qualified and acting Insular Collector of Customs of the Philippine Islands;

(d) That the petitioner is the agent and operator of the steamship "VENUS," a steam vessel engaged in the coastwise trade of the Philippine Islands;

(e) That the Insular Collector of Customs assessed customs duties in the amount of P159,960.00 upon repairs and construction work made upon the steamship "VENUS" in a foreign port, and made demand upon the petitioner for the payment of said sum;

(f) That the petitioner paid to the said Vicente Aldanese the sum so demanded, under protest;

(g) That said protest was based upon the ground that said repairs and construction work were exempt from the payment of customs duty.

All of the other facts alleged in the petition were expressly denied by the respondent.

The facts alleged in the answer and admitted by the demurrer to be true are:

(a) That the said steamship "VENUS" is a vessel documented for the Philippine coastwise trade, with a *gross and net tonnage* of 987.64 and 597.64, respectively;

(b) That prior to February 8, 1924, said vessel needed repairs; that notwithstanding the existence and availability of adequate facilities therefor in the Philippine Islands, the petitioner caused said repairs to be done at Hongkong at a cost of $300,004, Hongkong currency;

(c) That upon the arrival of said steamship in Philippine waters on or about the 20th day of October, 1924, the Insular Collector of Customs at Manila assessed and collected customs duty on said repairs in the sum of P159,960.00; that the petitioner paid said duties under protest;

(d) That on October 31, 1924, the Collector of Customs rendered a decision upon said protest, and ordered a refund of the amount collected to the petitioner; that on October 31, 1924, the respondent received a copy of the said decision of the Insular Collector of Customs on said protest;

(e) That the sum of (P159,960.00) which had been collected by the Insular Collector of Customs, as duty upon said repairs, had been received by the Insular Collector and had been deposited in the Insular Treasury of the Philippine Government and had become a part of the general unappropriated funds of said Government, in accordance with section 14 of Act 2935; that Act No. 357, as amended by Act No. 1515, provided for refunds

of customs duties *erroneously* and *illegally* collected by the Philippine Government; that the duty and responsibility to examine, audit and settle and revise all accounts and claims for refund of customs duty rests solely and exclusively with the respondent Insular Auditor;

(f) That immediately upon receipt of the decision of the Insular Collector of Customs on said protest sustaining the same, the respondent, in pursuance of the powers and duties entrusted to him by law, made or caused to be made inquiries and investigations for the purpose of ascertaining and verifying the correctness and veracity of the assertions, that the repairs made on the steamship "VENUS" at Hongkong could not have been made and executed in the Philippine Islands, to enable *him* to determine whether the refund ordered by the Insular Collector of Customs, or the payment for the credit so claimed, was actually made for objects or purposes authorized by Act 357 as amended by Act 1515, and for the accomplishment of which the particular appropriation in said Act is available;

(g) That on November 6, 1924, the respondent, being convinced, after said investigation, that adequate facilities for the repairs made on the steamship "VENUS" are afforded in the Philippine Islands, and conscious of the duties and responsibilities entrusted to him by the Jones Law, sent a letter to the Insular Collector of Customs, requesting reconsideration of his decision on said protest, on the ground that it is openly and manifestly contrary to the weight of the evidence and to the provisions of paragraph 200, section 8, and paragraph 348, section 11, of the Philippine Tariff Act of 1909, as considered and applied by the Supreme Court in the case of Gutierrez Hermanos vs. Collector of Customs (39 P. R. 876);

(h) That later, the respondent addressed another letter to the Insular Collector of Customs, furnishing him with additional written proofs demonstrating the incorrectness of his findings on said protest, and at the same time re-

quested him (the Collector) to again review said decision in the light of the newly found evidence, with the idea of assessing and collecting duties on the repairs and construction work done on said steamship "VENUS" that could have been executed in the Philippine Islands;

(i) That no reply was received from the Insular Collector of Customs to the various requests of the respondent herein; that on the 26th day of November, 1924, the Insular Collector of Customs presented to the respondent, for counter-signature, a warrant in favor of the petitioner for the sum of P159,960.00, said warrant being for the refund of the import duty so collected;

(j) That on November 28, 1924, *the respondent returned to the Insular Collector of Customs said warrant* and informed him *that no action thereon could be taken until after the request of the respondent for the reconsideration of the decision of said Insular Collector of Customs had been passed upon by him;*

(k) That on the same day (November 28th) the said Insular Collector of Customs returned the respondent's request for reconsideration of his decision on said protest;

(l) *That at the time the petition in the present cause was filed the respondent had not yet finally decided whether or not he would approve and countersign said warrant* for the sum of P159,960.00, drawn in favor of the petitioner.

It may be added that the respondent contends that the Supreme Court is without jurisdiction to consider the questions presented, for the reason that the petitioner has another *plain, speedy* and *adequate remedy* in the ordinary course of law, without resorting to the remedy prayed for, which other plain and adequate remedy is by an appeal to the Governor-General and then to the Secretary of War.

It would seem to be unnecessary to add, under the demurrer, that no facts alleged in the complaint and denied by the answer can be considered now.

Attached to a memorandum presented by the respondent there are many exhibits. Objection is made by the petitioner to the consideration of said Exhibits because they were inadmissible under the issue presented. We agree with the petitioner that they should not be considered, and they have not been, in our consideration of the question presented.

FIRST QUESTION

Under the foregoing admitted facts the *first* question to be considered is whether or not the merchandise, in value amounting to more than 300,000 Hongkong dollars, which were placed in the steamship "VENUS" at Hongkong in order to repair it, is admissible into the Philippine Islands free of duty. The Insular Collector of Customs decided *first* that said merchandise was not admissible free of duty, and *later* decided that it was.

Prior to the Act of Congress of August 5, 1909 (39 Statutes at Large, U. S., 553; Vol. 7, Public Laws of the P. I., 367), steamships or ships operating in the coastwise trade of the Philippine Islands, when they needed repairs such as boilers, engines, etc., etc., might go to Hongkong or to some other port where labor and material were cheaper and have such merchandise placed in them and bring the same into the Philippine Islands *without the payment of an import duty*. That practice worked a great injustice not only to the ship builders in the Philippine Islands, and repair docks, but to the Government itself, in that such merchandise was brought in without payment of duties. In other words, prior to the said Act, if a citizen of the Philippine Islands desired to construct a ship here he was obliged to bring in boilers, engines, iron, etc., for that purpose, and upon which he was obliged to pay an import duty.

Realizing the injustice which then existed, the Congress of the United States provided a revenue or adopted an "Act to raise revenue for the Philippine Islands." In

Section 11 (sub-paragraph 348) of that Act, a provision was made for the admission of certain merchandise into the Philippine Islands, free of duty, when the conditions therein were complied with. Said section 11 provided, in eight different sub-paragraphs, for the admission of merchandise into the Philippine Islands free of duty. Among the other merchandise so admitted there were included "repairs to vessels documented in the Philippine Islands or regularly plying in the Philippine waters, made in foreign countries, upon proof satisfactory to the Collector of Customs that adequate facilities for such repairs are not afforded in the Philippine Islands" sub-paragraph No. 348). A very similar provision to that just quoted is found in section 8, sub-paragraph 200 of said Act of Congress, which also provides: "boats, launches, and other water crafts set up or knocked down, imported into the Philippine Islands, *cost of repairs made in foreign countries to vessels or to parts* thereof, documented in the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, 50% ad valorem" shall be collected. Said sub-paragraph 200 contains a number of provisos. The first is "that upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, the same shall be subject to the provisions of sub-paragraph 348 of this Act."

This proviso was amended by an Act (No. 2872) of the Philippine Legislature of November 24, 1919, and approved by the President of the United States and put in force in the Philippne Islands by a proclamation of the Governor-General of the 11th day of December, 1919. The said amendment makes said proviso read as follows: "That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, *so that the work cannot be done there reasonably economically and within a rea-*

sonable time in the judgment of said collector, such repairs shall be subject to the provisions of paragraph 348 of this Act" (Act of August 5, 1909).

Under said amendment it will be noted that repairs to coastwise vessels may be made in foreign countries even though facilities for the making of such repairs existed in the Philippine Islands if in the judgment of the Collector of Customs the same repairs could not have been made in the Philippine Islands "reasonably economically and within a reasonable time." There is nothing in the admitted facts, nor even a suggestion, that the repairs in question could not have been made in the Philippine Islands "reasonably economically and within a reasonable time," while it does appear in the admitted facts, that there existed in the Philippine Islands "adequate facilities" for making such repairs. In view of the admitted facts and in the absence of an allegation "that the work (repairs) could not have been done reasonably economically and within a reasonable time" in the Philippine Islands, upon what theory was the merchandise in question, amounting to more than 300,000 Hongkong dollars, admitted free of duty? It is evident, under the admitted facts, that the merchandise is not admissible free of duty.

SECOND QUESTION

As a second question, it may be inquired: May the Auditor of the Philippine Islands ever intervene in the settlement of accounts of the Collector of Customs, for the purpose of ascertaining and deciding whether or not a mistake was made in imposing a duty upon an imported merchandise when none should have been imposed, or in admitting free of duty such merchandise when a duty should have been collected? If the Auditor is vested with authority to inquire into the legality of the collections of the Collector of Customs, then such collections can not be final and conclusive.

May the Collector of Customs today collect an import duty on merchandise, turn the collections into the public Treasury of the Government, and then tomorrow decide that the collection was erroneously made, and render a final decision ordering that the same be paid out of the Treasury, without satisfying the Auditor that the collection was, in fact, *erroneously* made? May the Collector himself thus create a demand or claim *against the Government which the Auditor cannot question?* If so, then the same officer may create a claim against the Government and at the same time audit it. Can that be done in the face of the provisions of section 1 of Act 3036, which provides that "the authority and powers of the Bureau of Audits extend to and comprehend all matters relating to accounting procedure, including the keeping of the accounts of the Government, the preservation of vouchers, the method of accounting, the examination and inspection of the books, records and papers relating to such accounts, and to the audit and settlement of the accounts of all persons respecting funds or property received or held by them in an accountable capacity, as well as to examine and audit *all debts* and *claims* of any sort due from or owing to the Government of the Philippine Islands in any of its branches?"

I maintain that, both under the Act of Congress and the statutory laws of the Philippine Legislature, the Auditor has jurisdiction over the collection of customs duties as well as over their refund, and give the following provisions of the Act of Congress and the statutory laws of the Philippine Legislature in support of that contention:

(a) Section 24 of the Act of Congress of August 29, 1916, confers upon the Insular Auditor of the Philippine Islands the following powers:

1. "The Auditor shall examine, audit, and *settle* all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government."

2. "He shall audit, in accordance with law and administrative regulations, all expenditures of funds pertaining to the Government."

3. "The administrative jurisdiction of the Auditor over accounts, whether of funds or property and of vouchers and records pertaining thereto, shall be exclusive."

4. "The Auditor is authorized to communicate directly with any person having claims before him for settlement."

5. "In the execution of their duties the auditor and deputy auditor are authorized to summon witnesses, administer oaths, and to take evidence, and, in the pursuance of these provisions, may issue subpoenas and enforce the attendance of witnesses, as now provided by law."

6. "The Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury."

(b) The very last word of the Philippine Legislature upon the question of the authority of the Auditor relating to the auditing of accounts by section 1 of Act 3036, provided:

1. For the general jurisdiction, authority and power of the Auditor; and

2. That such jurisdiction, authority and power shall extend to and comprehend all matters relating to accounting procedure, etc., etc., as well as to the examination and audit *of all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches.*

It would be difficult, if not impossible, in a statutory provision to use words in the English language which would more definitely and conclusively confer jurisdiction upon the Insular Auditor over the claim which the petitioner now presents for allowance. The voucher prepared by the Collector of Customs and presented for

counter-signature by the petitioner in the present case unquestionably represents a debt or claim against the Government of the Philippine Islands pertaining to the revenues thereof. Both the Act of Congress and the acts of the Philippine Legislature expressly provide that the Auditor shall *examine, audit all debts and claims of any sort due from or owing to the Government* of the Philippine Islands in any of its branches. No one will deny that the department of customs is one of the branches of the Philippine Government.

It is the theory of the majority opinion that the decision of the Collector of Customs is final and that the Auditor has no jurisdiction, right or authority to question his decision. In support of that contention there is cited Act No. 2872, which amends sub-paragraph 200 of section 8 of the Act of Congress of August 5, 1909. (Vol. 7, Public Laws, P. I.) Said sub-paragraph 200 of the Act of Congress of August 5, 1909, in relation with sub-paragraph 348 of the same Act, provided for the admission into the Philippine Islands, free of duty, of merchandise used in making repairs in a foreign port on vessels documented for the Philippine coastwise trade. Said merchandise were to be admitted free of duty if "upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs" the same shall be admitted free of duty under the provisions of sub-paragraph 348 (Sub-paragraph 200, proviso 1, and sub-paragraph 348 of Act of Congress of August 5, 1909).

Act No. 2872 of the Philippine Legislature and approved by the President of the United States amended said sub-paragraph 200 of the Act of Congress of August 5, 1909, so that the first proviso read as follows: "That upon proof satisfactory to the Collector of Customs that adequate facilities are not afforded in the Philippine Islands for such repairs, *so that the work can be done reasonably economically and within a reasonable*

time, in the judgment of said Collector, such repairs shall be subject to the provisions of sub-paragraph 348 of the Act of Congress of August 5, 1909." The majority opinion contends that said act gives the Collector authority to finally decide the question whether or not said merchandise, in the way of repairs, may be admitted free of duty, and having decided, his decision cannot be questioned, unless, in accordance with the provisions of sections 1383, 1384, and 1386 of the Administrative Code (Act 2711) the question is removed into the Court of First Instance. Section 1383 provides that the party aggrieved by the decision of the Insular Collector of Customs * * * may procure the cause to be removed for review into the Court of First Instance. Said section further provides that, "unless the proper party (aggrieved party) shall procure the cause to be thus removed into court for review, the action or decision of the Insular Collector shall be final and conclusive against him" (the party aggrieved). Clearly, under said section the petitioner could not "procure the cause to be removed into the Court of First Instance" for the reason that he is not aggrieved at the decision of the Collector of Customs. His complaint is that he is aggrieved at the decision of the Auditor.

Said section 1384 provides as to who may procure the cause to be removed for review in the Court of First Instance. It provides that "the removal of a cause into court may be had at the instance of the protesting party, etc." If the decision of the Insular Collector is adverse to the Government the cause may be removed in the manner hereinafter specified, by order of the department head. It will be noted that under the provisions of section 1384 the cause may be removed for review in the Court of First Instance by order of the department head. In the present case the department head (Secretary of Finance) failed and refused to remove the present cause for review in the Court of First Instance even though requested so to do.

Said section 1386 provides what shall be done in perfecting the removal for review in the Court of First Instance when the department head so orders. The department head in the present case, not having ordered the removal, then certainly said section (1386) can have no important bearing upon the issues presented nor upon the finality of the decision of the Collector of Customs.

Referring again to the provisions of said Act No. 2872 and to that provision "that upon proof satisfactory to the Collector of Customs, etc.," we desire to state that, that provision adds nothing to the power and authority of the Collector of Customs. Every piece of dutiable merchandise imported into the Philippine Islands is admitted upon the payment of duty or without duty "upon proof satisfactory to the Collector of Customs." The Collector of Customs is the sole judge in the first instance upon the question whether or not merchandise shall be admitted free of duty, and, of course, it must follow that said admission is "upon proof satisfactory" to him. We find no justification in the provisions of said Act 2872 nor in said sections 1383, 1384, and 1386 of the Administrative Code for the contention that the decision of the Collector of Customs is final against the Auditor in the present case, any more than in any other case where dispute arises concerning the admission of merchandise into the Philippine Islands with or without duty. The reports of the Supreme Court of the Philippine Islands contain many cases reversing the decision of the Collector of Customs when the duty was paid under protest and upon the ground that the merchandise should have been admitted free of duty.

It will also be noted that none of said provisions of the law make any reference whatever to the jurisdiction and authority of the Auditor. In the present case the Collector of Customs created a claim against the Philippine Government by issuing the warrant in question. The warrant, if held to be valid and binding obligation, be-

comes an obligation on the part of the Philippine Government to pay it. It is a debt, if valid, against the Government and, in our judgment, both the act of Congress and the long chain of acts of the Philippine Legislature clearly support "the authority and power of the Auditor to audit and settle the accounts of all persons respecting funds or property received or held by him in an accountable capacity, as well as to the examination and audits of all *debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches.*" (Act 3066 amending section 584 of Act 2711.)

Not only has the Auditor jurisdiction over the present matter as a claim *against the Government*, but it is clearly evident from both the Act of Congress and the acts of the Philippine Legislature that he has jurisdiction from the point of view of determining whether the claim if just can be paid from funds of the Government in accordance with the terms of a specific appropriation. The claim of the petition is a claim against the Insular Government arising out of the receipt of revenues, and under the law the Auditor must determine whether the claim comes under the terms of a particular appropriation. The mere fact that a general standing appropriation of the public funds is made, cannot be used for the purpose of liquidating particular claims until it is shown to the satisfaction of the Auditor that the particular claim falls under the general standing appropriation. There is only one exception to that rule and that is in the case where the Legislature specifically and unequivocally appropriates a certain amount of money for specific purpose.

Not only is the Auditor given "authority and power to audit all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches" but under the provisions of the Act of Congress of August 29, 1916, he is given power to summon and enforce the attendance of witnesses, to ad-

minister oaths and to hear evidence upon all such claims. Under the law, in our judgment, the Auditor is not a mere machine to register the opinions and decisions of others. He is required to certify balances due. He is required to exercise his judgment. He is not justified in following the judgments of others. His action upon a particular claim presented, is a decision, and that decision is by the law presumed to be made after an intelligent scrutiny of all of the facts relating to the claim itself and of the vouchers presented in support thereof. The Auditor is not only judge of the law but of the facts in such cases, and he would not be justified in accepting the views, opinions, findings or rulings of any other officer of the Government upon the claim or on the vouchers therewith submitted. His duties generally are discretionary in the highest degree. He is presumed to state the accounts according to the law and the facts. For him to admit claims which in his judgment are incorrect, would be not only a violation of the law but of his oath of office.

On whom did the Congress of the United States and the Philippine Legislature cast the burden of determining, for the Auditor, whether warrants coming before him for counter-signature are not warranted, authorized or justified by law? If on no other than the Auditor himself, would the Legislature not have indicated, expressly or impliedly, what officer? In the absence of such indication or of the slightest trace of a disposition or purpose to make the counter-signing a mere ministerial attestation it would seem to be clearly beyond dispute that the Legislative authority used in its obvious universal meaning the language in which it clarifies the Auditor's duty to countersign warrants; that by the inevitable force of the language used in the various laws, the Auditor has the sole responsibility and jurisdiction to pass upon claims in favor of or against the Government. That being true, he must determine for himself as to the legality of claims

presented. He must determine for himself as to such legality, whether his decision agrees or disagrees with the judgment of the persons who present the claim. In the performance of his official duty, the Auditor must exercise his own discretion and judgment; and such exercise is not an intervention of the discretion or a revision of the judgment lawfully exercised in relation to the same matter at a previous stage, by any other authority in the Government. In deciding that a particular warrant which comes before him for counter-signature is not warranted by law, and that he will therefore not countersign it, the Auditor does not assume to reverse or annul the prior action of any other officer in the Government. The Auditor simply exercises his own judgment in a matter concerning which the law has clothed him with a discretionary power or trust.

It is the duty of the Collector of Customs to construe and apply the customs laws, but it is the duty of the Auditor to see that in the collection of revenues and the expenditure of public funds of the Government, the law has been followed and that it has been properly interpreted.

We maintain that all the acts of the Philippine Legislature, including the Act of Congress, commencing with the order of May 8, 1899, down through all the acts of the Philippine Legislature Nos. 90, 145, 215, 328, 355, 361, 456, 807, 864, 907, 1402, 1792, 2711, 3036 and the Act of Congress of August 29, 1916, fully support the doctrine that the Auditor of the Philippine Islands has jurisdiction and authority to audit and decide finally, unless there is an appeal in accordance with the provisions of the law, debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches.

It should be remembered that the P159,960.00 in question was turned into the Treasury and had become a part of the public funds of the Philippine Government. *It is*

contended, however, that inasmuch as the Philippine Legislature (the United States Philippine Commission) provided a permanent annual appropriation "to refund moneys *erroneously received* and covered into the Treasury, including all cases of amounts deposited by officers as revenue collected," *that* the Collector of Customs may, on his own account and by his own authority, order the payment of any "*moneys erroneously received* and coveved into the Treasury" without the consent of the Auditor (Act 357 as amended by Act 1515).

The petitioner insists that by virtue of said provision of law the Auditor is under obligation to allow the payment of warrants like the one in question, without the exercise of any discretion whatever. That contention simply means that the Collector of Customs may finally decide, and without the possibility of having his decision questioned, that the "moneys *erroneously* received and covered into the Treasury," should be repaid. In other words, under the contention of the petitioner, the Collector of Customs has full and final authority to decide (a) that the moneys were *erroneously* received and covered into the Treasury; and (b) to order the repayment of such moneys, without the right of the Auditor to inquire into the question whether or not the moneys were, in fact and under the law, erroneously received.

As has been argued in this dissent, under the law the Auditor must scrutinize carefully the precise terms of every appropriation before he can approve an expenditure under it. Especially is this true in the case of continuing annual appropriation of long standing, in which no definite amount is set up. Such an appropriation is exceedingly dangerous, and without continual watchfulness the Government could be quietly bled of a large share of its revenues. Without some competent and efficient check upon the Collector of Customs or other collectors of public revenue, it is conceivable, if repayments are left to their individual discretion, that a large part of the duties

collected might be refunded upon protest if this Court establishes the precedent contended for in the present case, and the Government might thus be deprived of the funds absolutely necessary to continue its operations.

It will be noted, by reference to said acts, that they only permit the refund of moneys *erroneously received.* Under the law, who is to decide the question whether or not the moneys were in fact *erroneously received?* In view of the provisions of the acts of Congress and the Philippine Legislature, we are of the opinion that the Auditor must satisfy himself that the money in question, in the present case amounting to P159,960.00 was *erroneously collected.* That involves a careful investigation of the facts upon which he must base his decision. The forming of a decision which it is his sworn duty to make, very obviously demands an exercise of discretion, for there is not the slightest indication in the words of said acts, that the Auditor is to be bound by the opinions or decisions by any person or official of the Government.

The money which the Collector of Customs is now attempting to get out of the public Treasury, based upon said permanent appropriation, is simply appropriated to meet the refund of moneys *erroneously collected.* If the Legislature intended that the Auditor should be bound by the decision of the Collector of Customs, it would have so stated in plain terms. In view of the fact that under the law in force in the Philippine Islands, *no money can be paid out of the Treasury except by warrant* and no such warrant is valid unless it is *counter-signed by the Auditor,* it is plainly evident that, in the absence of anything in the law to the contrary, the Auditor is fully within his authority in refusing to countersign such warrant until and unless he has satisfied himself, that the money in question was, in fact and actually, *erroneously collected.* No effectual check can ever exist upon the expenditure of public funds in any case where the same officer authorizes the expenditures and then audits, or controls the audits of the accounts. (Lamb vs. Phipps, 22 P. R. 479.)

The great Chief Justice Marshall, in the case of Marbury vs. Madison (1 Cranch, U. S., 168), said:

> "We cannot issue the writ of mandamus in any case where the *proper remedy is by appeal, merely because the appropriate remedy may involve an inconvenient delay.*"

Inasmuch as said standing appropriation can only be used in payment of *"moneys erroneously collected,"* and inasmuch as it is the duty of the Auditor to safeguard the public Treasury and not allow funds to be paid out of the same until he is satisfied that both under the facts and the law they should be paid, we are confident in our belief, that it is the bounden duty, under the law, for the Auditor to decide, in the final analysis, whether or not the moneys had been in fact *erroneously collected.*

THIRD QUESTION

The third question which presents itself under the admitted facts is, whether or not the *decision* of the Insular Auditor, in refusing to countersign the warrant in question before he was informed fully concerning the causes which led the Collector of Customs to reverse his former decision, in which a duty was collected upon the merchandise in question, and decided that said merchandise should be admitted free of duty, was *final* until the same was reversed in accordance with the provisions of sections 24 and 25 of the Jones Law (Act of Congress, Aug. 29, 1916, 39 Statutes at Large, U. S. p. 553; Vol. 12 Public Laws of the Philippine Islands, 237).

One of the subdivisions of said section 24 provides that, "the decision of the Auditor shall be *final and conclusive* upon the executive branches of the Government, except that appeal therefrom may be taken by the *party aggrieved* or the head of the department concerned within one year, in the manner hereinafter prescribed. The Auditor, shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the *Comptroller of the*

United States Treasury, and is authorized to communicate directly with any person having claims before him for settlement, or with any department officer or person having official relations with his office." The provision with reference to the method and time of appeal is prescribed by section 25 of said Act. Said section (25) provides "that *any person aggrieved* by the action or decision of the Auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor-General, which appeal shall specifically set forth the particular action of the Auditor to which exception is taken, with the reason and authorities relied on for reversing such decision."

It will be noted from said quoted provisions that the decision of the Auditor shall be *final* and *conclusive* unless appeal therefrom in writing is taken by the party aggrieved or the head of the department concerned within one year to the Governor-General, etc. It is argued that, that provision making the decision of the Auditor *final* and *conclusive* does not apply to the courts, for the reason that the above quoted provision is, that the decision of the Auditor shall be *final* and *conclusive* upon the executive branches of the Government only. That argument is made, however, without taking into consideration that provision of the law which immediately follows and which is "*except that appeal* therefrom may be taken by the party aggrieved, etc.," which must be that the decision of the Auditor is final and conclusive upon the executive branches of the Government *only* when the person or head of the department aggrieved appeals within one year. *It seems to us that a doctrine that a decision which is final and conclusive as to one department of the Government is not also final and conclusive as to every other department of the Government, cannot be given serious consideration on the part of a disinterested and conscientious court.*

It is further argued that the decision of the Collector of Customs, ordering the return of the duties collected,

was final and conclusive and therefore the Auditor was without authority or jurisdiction to even inquire into his decision. In support of that contention our attention is called to section 1383 of Act 2711 (Administrative Code). It will be noted upon reading said section that no such conclusion can be drawn therefrom. It is not even intimated that his decision is *final* and *conclusive* as to any one *except the person making the protest.* The law expressly provides that "the action or decision of the Insular Collector shall be *final* and *conclusive against him* (the protestant) and then only final and conclusive unless the party shall procure the cause of the protest to be removed into court for review. In other words, said section simply provides that the decision of the Collector of Customs shall be *final* and *conclusive against the protestant* unless he appeals therefrom. There is no intimation in said section that the *decision* of the Insular Collector of Customs shall be *final* against the Auditor.

AUTHORITY OF THE AUDITOR OF THE PHILIPPINES—A RESUME OF THE LEGISLATION ON THAT QUESTION.

Considering, under the provisions of section 24 of the Act of Congress of August 29, 1916, that "the Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury," etc., and that "the decisions of the Auditor shall be *final* and *conclusive*," etc., it becomes important for the decision of the question before us to ascertain:

First. What is the "like authority conferred by law upon the auditors and the Comptroller of the United States Treasury" and,

Second. What are the particular powers and duties relating to the final and conclusive decisions of the Auditor of the Philippine Islands, as provided for by law.

FIRST.—WHAT ARE THE POWERS AND AUTHORITY, AND THE FINALITY AND CONCLUSIVENESS OF THE DECISIONS OF THE AUDITORS AND THE COMPTROLLER OF THE UNITED STATES TREASURY?

Very early in the history of the Federal Government of the United States it became advisable to have accounting officers. For that purpose Congress provided for the settlement of accounts by auditors and comptrollers of the Treasury. The Congress of the United States very early in its history discovered that "no effectual check can ever exist in any case (of accounting) where the same officer authorizes the expenditure and then audits it, or controls the audits of the accounts." See Senate Document No. 6, p. 5, of the Second Session of the 23rd Congress of the United States.

Congress very early provided that all *controversial* or questioned accounts should be passed upon by auditors or by the Comptroller of the Treasury and that their decision should be *final* and *conclusive*. That has been the doctrine in the Federal Government of the United States for nearly one hundred years. Experience taught those who were responsible for the financial administration of the Federal Government that mere paper balances are not always reliable; that the actual funds and property of the Government are not always visible in such balances. The question which we are now discussing is not a new one. As early as the administration of Presidents Monroe, Adams, Jackson and Polk, we find that the same question was up for decision. During the administration of President Monroe and President Adams the doctrine, so clearly and explicitly stated, appears to have been uniformly adhered to. President Jackson, who was not apt to shun responsibility that belonged to him, fully acknowledged his want of authority over the accounting officers in the settlement of claims. Messrs. Peebles and Gorham, contractors for supplies in the subsistence de-

partment of the United States army, being dissatisfied with the final adjustment of their account by the Comptroller, applied to President Jackson for relief, who referred the application to the Secretary of War, by whom, through the Commissary-General, a report was made July 1st, 1835. The opinion of President Jackson, in his own original autograph, is found indorsed on the papers in the auditor's office, as follows: "The report made—attorney-general's opinion—referred to. The decision of the Comptroller is final, over whose decisions the President has no power, except by removal. The Secretary of War will make known this decision to Mr. Peebles. A. J."

Again, during President Polk's administration an application was made to him to interfere with the adjustment of the same claim which he declined to do, making his indorsement on the papers as follows: "I have considered the application in the case to open the accounts of Bryant, etc., Co., and decline to interfere upon the ground that Congress has expressly given the authority to settle claims to the accounting officers (Comptroller) of the Treasury Department, and that I have no right to control these officers in the performance of their duty. August 9, 1845. J. K. Polk."

In the case of Decatur vs. Paulding (14 Peters, 497 (1840)) Mr. Chief Justice Taney, speaking for the Court said:

"Where a law imposed a duty which required the exercise of judgment and discretion the court had no right, by mandamus, to control his judgment, and guide him in the exercise of a discretion which the law had confided to him."

In the case of the United States vs. Arredondo et al. (6 Peters, U. S., 689, 729) the Supreme Court of the United States said:

"He (the Auditor or Comptroller) is required to certify balances due in favor of or against the Government.

To certify is to make certain. To make a certificate is to exercise judgment and discretion. He is required to render decisions upon the legality of claims, and his conclusions are not *mere opinions.* In rendering decisions, judgment and discretion must necessarily be exercised. A decision is by the law presumed to be made after an intelligent scrutiny of all the facts has been made. In the discharge of his duty (Auditor or Comptroller's) he is judge not only of the law but of the facts; and he would not be justified in accepting views, opinions, findings or rulings of any other officer of the Government upon the claims or vouchers admitted. In the performance of his duties, the Auditor is not subject to the jurisdiction of any officer of the executive branch of the Government *nor to that of any court of the judicial branch.* He is not a mere machine to register or blindly execute the opinions or acts of other officers in matters which pertain, by the laws of the fiscal system to the Government, by well defined public policy, and by long practice, to the jurisdiction of the accounting officer—a jurisdiction which it is his duty to maintain even in cases in which its existence may be doubtful."

The legislative department of the Government would not have made the decisions of the auditor *final and conclusive,* unless an appeal is taken therefrom, without intending to give to the auditor and Comptroller an uncontrollable discretion in fully examining and scruitinizing every account presented against the Government. The power to certify a balance, for a like reason, includes the authority to review and decide all questions of law and fact *and to use all sources of information for that purpose.* A settlement of an account and certificate of a balance which can not go to the sources of evidence and examine all questions of law and fact, would be practically no examination at all.

In the case of Longwill vs. U. S. (17 Court of Claims, 291) it was said:

"The accounting officers of the Treasury are no doubt bound to scrutinize claims and accounts with great care, as is their custom, and it is the undoubted right of those who have the authority to decide thereon to reject in whole or in part, as their judgment dictates, all those claims which they have reasonable cause to suspect are tainted with fraud or in which they believe there may be substantial defect in law or as to the validity of which they are in doubt."

In the case of the Board of Liquidation vs. McComb (92 U. S. 541) the Supreme Court of the United States said:

"The objections to proceedings against state officers by mandamus or injunction are: *first*, that it is, *in fact, proceedings against the state itself;* and, *second*, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of an executive officer in matters belonging to the proper jurisdiction of the latter." (Work vs. U. S. Ex rel. Rives, Decision of the Supreme Court of the United States, March 2, 1925, and cases cited. 69 Law Ed.; Work vs. United States, Ex rel. Chestatee, decided March 2, 1925, 69 Law Ed.)

For the courts to require an auditor or Comptroller to allow or disallow a claim against or in favor of the Government would be to substitute the courts as the auditing officer of the Government. Such a result was not contemplated by Congress when it conferred final and exclusive jurisdiction upon the auditing department of the Government (Kendall vs. U. S., 12 Peters, 524; Decatur vs. Paulding, 14 Peters 497; The Borough, etc., vs. Pennsylvania, 34 Pa. 294.)

Under the statute of the United States the auditor and Comptroller of the Treasury are, by statute, authorized to examine accounts and to certify balances thereon.

The exercise of that power necessarily involves the exercise of judicial discretion. Judicial action can not be subject to any control or direction except by law or by an appeal. It is independent of all control except by law. The authority so given by statute should be exercised with that untrammeled independence of judgment which is essential to its proper exercise.

In the case of the U. S. vs. Lynch (137 U. S. 280) a petition was presented to compel the Comptroller to pay the petitioner the sum of $288.60, being an amount remaining unpaid for travel expenses incurred under an act of Congress. Upon the consideration of a demurrer to the petition that Court said: "That mandamus will not lie against an officer of the Treasury Department for refusal to allow and pay a claim against the United States, for, however obviously without legal justification his refusal may be, a mandamus against him to compel such allowance and payment is *none the less, in effect a suit against the United States.*" (Decatur vs. Paulding, 14 Peters, 497 (1840.))

In the case of Riverside Oil Co. vs. Hitchcock (190 U. S. 316) Mr. Justice Peckham, speaking for the Court and after citing and discussing the case of Decatur vs. Paulding, said:

"That the decision of the questions presented to the Secretary of the Interior was no *merely formal or ministerial act* as shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. *Whether he decided right or wrong is not the question.* Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus."

In the case of Bates, etc., vs. Payne (194 U. S. 105) Mr. Justice Brown, speaking for the Supreme Court, said:

"That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of the department, his decision thereon is conclusive unless the law allows an appeal." (Lamb vs. Phipps, 22 P. R. 456.)

Dr. James L. High, one of the clearest American law writers, in his valuable work on "Extraordinary Legal Remedies" in section 102, after discussing the right of the courts to coerce the performance of purely ministerial duties, said:

"Where, however, auditing officers entrusted by law with the duty of passing upon and determining the validity of claims against the state, are vested with powers of discretionary nature as to the performance of their duties, a different rule from that above stated prevails. In such cases the fundamental principle denying relief by mandamus to control the exercise of official discretion applies, and the officers having exercised their judgment and decided adversely to a claimant, mandamus will not lie to control their decision or to compel them to audit and allow a rejected claim. The remedy, if any, for such a grievance, must be sought at the hands of the legislature, and not of the courts. (Auditorial Board vs. Arles, 15 Tex. 72; Auditorial Board vs. Hendrick, 20 Tex., 60; Towle vs. State, 3 Fla., 202; State vs. Doyle, 38 Wis., 92; People vs. Auditor of Colorado, 2 Colo. 97; State vs. Oliver, 116 Mo., 188; Burton vs. Furman, 115 N. C., 106; Wiles vs. Smith, 76 Md., 469; State vs. Babcock, 22 Neb., 38; State vs. Boyd, 36 Neb., 60.) Especially will relief by mandamus be refused in such cases when the party aggrieved has a *plain and adequate remedy by appeal* from the refusal of the auditing officer to allow his claim. And when an auditor or a comptroller is vested with certain discretionary powers in the adjusting and settlement of demands against the state, he cannot be compelled to issue his warrant or liquidate said claim for the payment of a particular sum, nor will

the writ go to compel an officer to audit a claim unless it is clearly his duty so to do. (Wailes vs. Smith, 76 Md., 469; Drew vs. Russel, 37 Vt., 250.)"

Mr. Spelling, in his work on "Injunctions and Other Extraordinary Remedies," in a very learned and extensive discussion of the questions now before us says that mandamus will not lie in any matter requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confined by law, either to control the exercise of that discretion or to determine the decision which shall be finally given but only to *set him in motion and compel him to exercise his function according to some discretion when he has refused or neglected to act at all.* (United States vs. Seaman, 17 How., 225; People vs. Fairchild, 67 N. Y., 334; State vs. Board of Liquidators, 29 La. Ann., 264; Freeman vs. Selectmen of New Haven, 34 Conn., 406, Rutter vs. State, 38 Ohio, 496; United States vs. Commissioner, 5 Wall, 563; People vs. Board of Commissioners of Cook County, 176 Ill., 576; People vs. Maher, 141, N. Y., 330; Boyne vs. Ryan, 100 Cal., 265.) And *of course, where another remedy exists,* as under the express statutes of the Philippine Islands, mandamus will not be granted.

Mr. Merril, in his work on "Mandamus," in discussing the same question says: (Sec. 32)

"The writ lies to make a body or officer charged with a duty, involving judgment or discretion, *to take action in the matter.* When a subordinate body is vested with power to determine a question of fact, the duty is judicial and though it can be compelled by mandamus to *determine the fact it can not be directed to decide in a particular way,* however clearly it may be made to appear what decision ought to be. A court will be ordered to proceed to judgment, but it will not be instructed to render a particular judgment. * * * When a decision has been reached in a matter involving discretion,

a writ of mandamus will not lie to review or correct it, no matter how erroneous it may be."

Mr. Arthur L. Sanborn, one of the ablest of the judges of the United States District Court for the western district of Wisconsin, in his article on "Mandamus," published in volume 26 of the Cyclopedia of Law and Procedure (Cyc.), in discussing the right of the courts to issue mandamus against an auditor, says:

"Where a state auditor in the discharge of his duties has a discretion to exercise, as for instance in the allowance or rejection of a claim against the state, his decision cannot be controlled by mandamus * * *. Where there is another adequate remedy, as for instance, where the right of appeal is given to a claimant whose claim has been disallowed in whole or in part by the auditor, the writ will not lie." (26 Cyc. 237.)

In speaking of the remedy by mandamus against the comptroller, Mr. Sanborn says: (26 Cyc., 239.)

"But the writ will not lie where its effect would be to interfere with the comptroller in matters requiring the exercise of judgment and discretion on his part. Thus, it is held that a comptroller cannot be compelled to audit claims against the state in any particular way or for any particular amount. In the same way, where the duty of the comptroller to perform the act in question is not clear, or where there is *another adequate remedy* at law, the writ will not lie. (Patty vs. Colgan, 97 Cal., 251; People vs. Roberts, 163 N. Y., 70.)"

Not only has it been the uniform doctrine maintained by the authorities of the Government of the United States and the law writers that those who are charged with the responsibility of auditing accounts in favor of and against the government must be left absolutely free and untrammeled, but the *state* governments of the United States as well have established the same doctrine. In case of Holliday vs. Henderson (67 Ind., 103) the court said:

"Where a state auditor in the discharge of his duties has a discretion to exercise, as for instance, in the allowance or rejection of a claim against the state, his decision cannot be controlled by mandamus, *especially after the auditor has already acted upon the matter.*" (26 Cyc., 237.)

See also the following cases: (Danley vs. Whiteley, 14 Ark., 687; People vs. Colorado Territorial Auditor, 2 Col., 97; State vs. Thompson, 41 Mo., 13; State vs. Barnes, 25 Fla., 298 (23 Am. St. Rep., 516); Wailes vs. Smith, 76 Md., 469; Lewright vs. Love, 95 Tex., 157; People vs. Adam, 3 Mich., 427; Burton vs. Furman, 115 N. C., 166; County of San Luis Obispo vs. Gage, 139 Cal., 398; People vs. Roberts, 163 N. Y., 70; Rutgers College vs. Morgan, 71 N. J. L. 663; State vs. Nolan, 8 Lea, 663; People vs. Attorney-General, 41 Mich., 728; Thompson vs. Watson, 48 Ohio, 552; Ewbank vs. Turner, 134, N. C., 77; State Board of Dental Examiners vs. People, 123 Ill., 227; State vs. Slocum, 34 Neb., 368.)

SECOND.—WHAT ARE THE PARTICULAR POWERS AND DUTIES RELATING TO THE FINAL AND CONCLUSIVE DECISIONS OF THE AUDITOR OF THE PHILIPPINE ISLANDS, AS PROVIDED FOR BY LAW?

The following is a brief history of legislation for the Philippine Islands relating to the appointment, and authority of the Auditor *in the settlement of accounts* and claims against the Government.

First.—*During the Military Government.*

One of the very first orders, by President McKinley, as commander in chief of the military forces in the Philippine Islands, provided for the protection of the public funds in the Treasury. President McKinley issued an

executive order, from which the following paragraphs are quoted:

"By virtue of the authority vested in me as commander in chief of the army of the United States, I hereby order and direct that during the maintenance of the military government by the United States in the Islands of the Philippine Archipelago, there is hereby created and shall be maintained the office of the auditor for the Islands, to be filled by appointment of the Secretary of War, whose duty shall be to receive and audit all accounts of the Islands.

"All rules and instructions necessary to carry into effect the provisions of the executive orders relating to said Islands shall be issued by the Secretary of War, and such rules and instructions shall be in force until the same are amended or revoked by the Secretary of War."

Under the instructions of the President and the executive order of the War Department (Executive Order May 2, 1899), certain rules and instructions which, after having received the approval of the President and Secretary of War, were transmitted to the United States Philippine Commission for enactment in the form of statute, which was done by Act 90 of the United States Philippine Commission. It was provided by the Secretary of War that the statutes so enacted could not be modified without the previous consent of the Secretary of War (letter by Secretary of War to the President (Mr. Taft) of the United States Philippine Commission, of Jan. 7, 1901).

From said rules and instructions we find the following pertinent provisions:

"Rule 2. The Auditor for the Islands shall receive, examine and settle all accounts pertaining to the revenue and receipts derived from the Islands and expenditures paid therefrom, and certify the balance thereof to the military governor and shall preserve the accounts and vouchers after settlement.

"Rule 41. Every contract under which payment may be made shall be submitted to the Auditor with the account to which such payment pertains.

"Rule 44. The jurisdiction of the Auditor for the Islands over accounts and all vouchers pertaining thereto shall be exclusive. His decision shall be final and conclusive upon the administrative branches of the military government except that appeals therefrom may be taken by the party aggrieved or the head of the department concerned, within one year, in the manner prescribed in rule 72. The Auditor for the Islands shall, except as herein otherwise provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury, and is authorized to communicate directly with any person or officer having claims before him, for settlement or with any officer or department having official relations with his office.

"Rule 72. Any person aggrieved by the action or decision of the Auditor in the settlement of his account or claim by that officer may within one year take an appeal in writing to the military governor, which shall specifically set forth the particular action of the Auditor to which exception is taken, with the reasons and authorities relied on for reversing such action. If the military governor shall confirm the action of the Auditor he shall so indorse the appeal and transmit it to the Auditor, and the action of the Auditor shall thereupon be final and conclusive. Should the military governor fail to sustain the action of the Auditor, he shall forthwith report his grounds of disapproval to the Secretary of War, together with the appeal and papers necessary to a proper understanding of the matter. The decisions of the Secretary of War in such cases shall be final and conclusive."

Second—During the Civil Government

The "Taft United States Philippine Commission" at the very beginning of the exercise of its legislative power took steps to provide for an accounting of public funds by responsible accounting officer. Said commission on the 28th day of February, 1901, enacted into a statute, known as Act 90, the executive order of May 8, 1899, including therein the provisions of an executive order issued by President McKinley on the 23rd day of February, 1901. Commencing with said executive order of May 8, 1899, under the military government, which was brought forward and enacted into a statute by Act 90, under the civil government, we believe that the following acts show all of the important legislation adopted by the Philippine Legislature and Congress relating to the duties, power and authority of the Auditor of the Philippine Islands: Acts Nos. 145, 195, 215, 328, 361, 456, 807, 909, 1402, 1792, 3036, and sections 24 and 25 of the Act of Congress of August 29, 1916.

Passing over the similar provisions of said acts, we come first to Act No. 1792, which was known as the "Accounting Act," which was adopted with the consent of the Secretary of War of the United States. Section 2 of that act provided that "there shall be an auditor for the Islands, who shall be Director of the Bureau of Audits, and who shall be appointed by the Secretary of War, with the concurrence of the Governor-General and the approval of the Philippine Commission. The duty of the Auditor shall be to examine, audit, and *settle* all accounts pertaining to the revenue and receipts from whatever source of the Insular Government, etc., and to audit, in accordance with law and administrative regulations, all expenditures of funds and property pertaining to or held in trust by the Insular Government, etc."

Section 6 of said Act (1792) provided that:

"The jurisdiction of the Auditor over accounts, whether of funds or property, and all vouchers and rec-

ords pertaining thereto, *shall be exclusive*. With the approval of the Governor-General he shall from time to time make and promulgate general or special rules and regulations not inconsistent with law covering the methods of accounting for public funds and property, and funds and property held in trust by the Insular Government or any of its branches: *Provided*, That any Director of Bureau or other officer accountable for public funds or property under the provisions of this Act may require such additional reports or returns from his subordinate or others as he may deem necessary for his own information and protection.

"The *decisions* of the Auditor *shall be final and conclusive* upon the executive branches of the Government, except that appeal therefrom may be taken by the party aggrieved or the head of the Department concerned, within one year, in the manner hereinafter prescribed. The Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several Auditors of the United States and the Comptroller of the United States Treasury, and is authorized to communicate directly with any person having claims before him for settlement, or with any Department, officer, or person, having official relations with his office."

Section 36 of said Act (1792) provided that:

"Any person aggrieved by the action or decision of the Auditor in the settlement of his account or claim may within one year take an appeal in writing to the Governor-General, which appeal shall specifically set forth the particular action of the Auditor to which exception is taken, with the reason and authorities relied on for reversing such decision. If the Governor-General shall confirm the action of the Auditor, he shall so indorse the appeal and transmit it to the Auditor, and the action shall thereupon be final and conclusive. Should the Governor-General fail to sustain the action of the Auditor, he shall forthwith transmit his grounds of disapproval to

the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive."

Section 11 of said Act 1792 provided for the appointment of a Treasurer of the Philippine Islands, who shall receive and safely keep all moneys arising from the revenues and receipts of the Islands from whatever source derived * * * and shall disburse the same *only* on warrants, *countersigned* by the Auditor, etc. From a comparison with section 6 above quoted, with rules 44 and 72, and the executive order of May 8, 1899, as brought forward and made a part of said Act 90, it will be seen that the only difference, in fact, is that the "military governor" has been changed to the "Governor-General."

The foregoing quotations show what the law was relating to the powers, duties and authority, and conclusiveness and finality of the decisions of the Auditor at the time of the adoption of the Act of Congress of August 29, 1916.

With reference to sub-paragraphs 5 and 6 of section 24 of said Act of Congress, we find the following provisions relating to the "powers, duties and authority, and conclusiveness and finality" of the decisions of the Auditor:

"The administrative jurisdiction of the Auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive. With the approval of the Governor-General he shall from time to time make and promulgate general or special rules and regulations not inconsistent with law covering the method of accounting for public funds and property, and funds and property held in trust by the Government or any of its branches. *Provided*, that any officer accountable for public funds or property may require such additional reports or returns from his subordinates or others as he

may deem necessary for his own information and protection.

"The decisions of the auditor shall be *final* and *conclusive* upon the Executive Branches of the Government, except that appeal therefrom may be taken by the party aggrieved or the Head of the Department concerned within one year, in the manner hereinafter prescribed. The Auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury and is authorized to communicate directly with any person having claims before him for settlement, or with any department, officer, or person having official relations with his office."

It will be noted from said quoted provisions of the Act of Congress that they were practically taken *in hec verba* from Act No. 1792 of the Taft United States Philippine Commission, and in effect were exactly the same provisions which were enforced during the military government by executive order of May 8, 1899. By reference to section 36 of Act 1792, above quoted, we find that it was brought forward and made a part of section 25 of the said Act of Congress. Said section 25 provides:

"That any person aggrieved by the action or decision of the Auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor-General, which appeal shall specifically set forth the particular action of the Auditor to which exception is taken, with the reason and authorities relied on for reversing such decision.

"If the Governor-General shall confirm the action of the Auditor, he shall so indorse the appeal and transmit it to the Auditor, and the action shall thereupon be final and conclusive. Should the Governor-General fail to sustain the action of the Auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of

War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be *final* and *conclusive.*"

The Philippine Legislature evidently not being satisfied concerning the jurisdiction and power of the Auditor of the Philippine Islands, on March 16, 1923, adopted Act No. 3066 (Vol. 18, Public Laws of the Philippine Islands, 140). That act provided that the authority and power of the Auditor of the Philippine Islands shall extend to and comprehend all matters relating to accounting procedure, including the keeping of the accounts of the Government, the methods of accounting, the examination and inspection of the books, records and papers relating to such accounts, and to audit and settle the accounts of all persons respecting funds or property received or held by them in an accountable capacity, *as well as to the examination and audit of all debts and claims of any sort, due from or owing* to the Government of the Philippine Islands in any of its branches. The department of Customs is one of the branches of the Philippine Government.

From all of the foregoing quotations, commencing with the executive order of May 8, 1899, down to the Act of Congress of August 29, 1916, and the Act of the Philippine Legislature of March 16, 1923 (Act 3066), there have been practically no changes whatever in the *power, duty, authority,* and *finality* and *conclusiveness of the decisions of the Auditor* of the Philippine Islands in the settlement of accounts against the Government.

Rule 44 of the executive order of May 8, 1899, provided that: "The jurisdiction of the Auditor for the Islands over accounts, and all the vouchers pertaining thereto, shall be *exclusive.* His *decision shall be final and conclusive* except that an appeal thereon by the party aggrieved, etc."

Rule 72 of said executive order of May 8, 1899, provided that: *"Any person aggrieved by the action or de-*

cision of the Auditor in the settlement of his accounts or claim by that *officer* may within one year take an appeal in writing to the military governor, etc."

Said rules 44 and 72 were made a part of said Act 90.

Section 6 of Act 1792 provided that the jurisdiction of the Auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, *shall be exclusive* . The decisions of the Auditor shall be *final and conclusive* except that appeal therefrom may be taken by the party aggrieved within one year as provided in section 36.

Section 24 of the Act of Congress of August 29, 1916, among other things provided that the jurisdiction of the Auditor over accounts, whether of funds or property, and all vouchers and record pertaining thereto *shall be exclusive*. The decisions of the Auditor shall be *final* and *conclusive* upon the executive branches of the Government, except that appeal therefrom may be taken by the party aggrieved within one year, in accordance with section 25 of said Act.

Act 3036, of the Philippine Legislature, as late as March 23, 1923, provided that the authority and power of the Auditor shall extend to and comprehend all matters relating to accounting procedure of the Government and as well as to the *examination* and *audit* of *all debts* and *claims of any sort due from or owing* to the Government of the Philippine Islands in any of its branches.

From the foregoing it is clearly seen that the provisions of the Jones Law are not new in this jurisdiction. They have been in force in the Philippine Islands since the days of the military government. The Jones Law contains no provision not in force since the executive order of May 8, 1899.

From an examination of the admitted facts above quoted, it clearly appears that the petitioner herein is an aggrieved party resulting from the refusal of the Auditor to countersign the warrant issued by the Collector

of Customs for the sum of P159,960.00. If he is an aggrieved party by the action of the Auditor, then the law affords him a remedy by an appeal to the Governor-General. Instead, however, of even attempting to take advantage of the remedy which the law affords him, he at once presented the present petition and asked this Court to substitute its judgment for that of the Auditor, and to compel the Auditor to do what this Court believes he ought to have done in the face of the fact that the law provides that "the decisions of the Auditor are final and conclusive" except when an appeal is taken therefrom.

No rule of law is better established than the one which provides that when "an administrative remedy is afforded" the courts will not take jurisdiction until after the administrative remedies have been exhausted.

First National Bank vs. Weld County, 264 U. S., p. 450 (1924).
McGregor vs. Hogan, 263 U. S. 234.
Farncomb vs. Denver, 252 U. S. 7, 10.
Londoner vs. Denver, 210 U. S. 373.
Price vs. Illinois, 283 U. S. 46.
Petoskey, etc., Co. vs. Petoskey, 162 Mich., 447.
Ward vs. Alsup, 100 Tenn. 619, 746.

The administrative remedies must first be exhausted before resort can be had to the courts. The courts can not assume that if the administrative remedy had been followed, proper relief would *not* have been accorded.

Collins vs. City of Keokuk, 118 Io. 30, 35.
Lo Po vs. H. B. McCoy, 8 P. R. 343.
Jao Igco vs. Shuster, 10 P. R. 448.
U. S. vs. Ju Toy, 198 U. S. 253.
U. S. vs. Sing Tuck, 194 U. S. 161.
U. S. vs. Yu Kiao, 20 P. R. 307.
Lee Jua vs. Coll. of Customs, 32 P. R. 24.
Cooley, on Taxation, 3rd Ed. p. 1393.

Nor will the petitioner be heard to say that there was not adequate time for hearing, in the absence of any effort on his part to obtain one.

> First National Bank vs. Weld County, 264 U. S. 450. .

It is admitted that, in any case where the Auditor is required to act and the law gives him no discretion, he may be required to act by mandamus.

> Work vs. McAlester & Co., 262 U. S. 200.
> Work vs. U. S., Ex rel. Mosier, 261 U. S. 352.

But this is not the case here.

An examination of the authorities relied upon to sustain the majority opinion, in order to ascertain their value in the premises, is important. The first is the case of Fernandez Hermanos vs. Collector of Customs (30 P. R., 50). In that case the Auditor was not a party. No question was presented concerning his authority. The only question discussed was, whether or not certain mechandise used in making certain repairs on the steamship "Islas Filipinas" at the port of Hongkong was admissible free of duty in the Philippine Islands. The Collector of Customs insisted that said merchandise was subject to an import duty. The Steamship Company asserted that the same was not subject to an import duty. That case clearly establishes the fact that the decision of the Collector of Customs is not final upon the question whether or not imported merchandise is subject to an import duty.

The next case cited in the majority opinion, in support thereof, is that of Gutierrez Hermanos vs. Collector of Customs (39 P. R. 876). In that case the Auditor was not a party. No question was raised concerning his authority. The only question discussed and decided was whether or not certain merchandise which had been used in making repairs to the steamship "Magal-

lanes" in a foreign port could be brought into the Philippine Islands without the payment of an import duty. Again the Court held that the decision of the Collector of Customs upon the question whether merchandise should be admitted with or without a duty was not a final decision.

The next case cited to support the conclusion of the majority opinion is that of Concepcion vs. Paredes (42 P. R. 599). We fail to see how that decision can be invoked to support the doctrine that this Court can, by mandamus, compel the Auditor to countersign the warrant in question. The Auditor was not a party and no question was presented touching his authority to do or not to do anything.

The next case cited is that of Hoey vs. Baldwin (1 P. R. 551). We fail to see how that case can in any way support the doctrine contended for in the majority opinion. The Auditor was not a party. No question was presented nor discussed touching his power and authority.

The next case cited in support of the doctrine laid down by the majority opinion is that of Lamb vs. Phipps (22 P. R. 456). We agree that, that case is good authority upon the question of the power, authority, and jurisdiction of the Auditor. In the case this Court discussed at length the powers, the duties and the authority of the Auditor of the Philippine Islands. In the argument in the Lamb case, from the beginning to the end, every word used is contrary to the contention of the majority opinion.

The next case cited is that of Zobel vs. City of Manila (23 O. G., 411). Here again the Auditor was not a party, and, of course, cannot be bound by any dictum contained in the decision in that case. The authority of the Auditor was not in question.

The next case cited in support of the conclusions of the majority opinion is that of the Compania General de

Tabacos de Filipinas vs. French, as Auditor of the Philippine Islands, and C. E. Unson, as Purchasing Agent of the Philippine Islands. That case was an original petition for the writ of mandamus presented in the Supreme Court. Its purpose was to compel the said Insular Purchasing Agent to issue a warrant to pay the freight on certain merchandise carried by the plaintiff in its steamship "VENUS" amounting to P322.93. The petition further demanded that Mr. French, as Auditor, after the Insular Purchasing Agent had issued his warrant, countersign the same. Thus it will be seen that the petitioner was seeking to compel the Insular Purchasing Agent, with the intervention of the Auditor to pay a contract of indebtedness which the petitioner claimed was due to it from the Insular Purchasing Agent.

The facts in that case may be briefly stated: That during the months of January, February, and March, 1919, the Compania General de Tabacos de Filipinas, contracted with the Insular Purchasing Agent for the transportation of goods and merchandise from the port of Manila to sundry ports in the Philippine Islands; that the contract price for the transportation of said goods and merchandise, as freight, amounted to P322.93; that on one of the shipments of goods and merchandise transported from Manila to the municipality of Laoag, of the province of Ilocos Norte, it was discovered that there had been lost in transit a part of two cans of gasoline, which loss was estimated to amount to P5.92, or $2.96; that when the petitioner presented his bill for freight for the sum of P322.93, the Insular Purchasing Agent insisted that the amount of the loss of the gasoline should be deducted: that the petitoner objected to said deduction, insisting that it was not responsible for said loss; that later and after some controversy Mr. C. E. Unson, Purchasing Agent of the Bureau of Supply, issued his warrant, payable to the petitioner (the Compania General de Tabacos de Filipinas) on the 27th day

of April, 1919, for the sum of P317.01, being the amount of said freight, less the P5.92. That warrant was countersigned by C. H. French, Insular Auditor. The petitioner herein refused to accept said warrant even though it was countersigned by the Auditor, Mr. French, unless the P5.92 was included. Later, and on the 9th day of May, 1919, a petition was presented demanding that the Supreme Court issue a writ of mandamus to compel the Insular Purchasing Agent to issue his warrant for the full amount of said freight, including the disputed claim of P5.92, and that when said warrant was once issued, that the Insular Auditor be required to countersign the same.

The respondents demurred to said petition upon the following grounds:

"1. That petition fails to show that the decision of the Auditor of the Philippine Islands, which is final and conclusive under the terms of the Organic Act of Government, has been appealed from, as provided in sections 24 and 25 of an Act of Congress entitled, 'An Act to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those Islands', approved August 29, 1916.

"2. That the petition fails to show that the petitioner has taken an appeal from the decision of the Auditor of the Philippine Islands, as required by law, and as precisely laid down and governed by sections 652, 654, 655 and 656 of the Administrative Code.

"3. That the petition affirmatively shows that the said petitioner has not pursued the remedy provided by law for the redress of the alleged injury to it, growing out of the said decision of the Auditor of the Philippine Islands, and more precisely referred to in the said petition.

"4. That the said petition contains no averment that the petitioner has exhausted the remedies provided by

law for the relief which it now seeks by said petition, and that such petition, for want of such averment, is fatally defective."

Upon a consideration of the petition and the demurrer, it was ordered that the writ of mandamus issue in accordance with the prayer of the petition unless the respondent answer the petition within the period of five days. The respondent failed to answer said petition of the Supreme Court on the 27th day of May, 1919, ordered that a writ of mandamus issue, directing the respondents, the Insular Purchasing Agent and the Insular Auditor, to issue, countersign, and deliver in conformity with the customary usage, the proper treasury warrant, payable to the petitioner for the sum of P322.93, in satisfaction of the credit claimed for transportation services referred to in the complaint, without deduction or abatement; *it being understood, however, that this order is without prejudice to the right of the Government to institute an independent action to recover the sum of* P5.92, *which is claimed by the Government to be due from the petitioner.*

By said final order it will be seen that the Supreme Court of the Philippine Islands first ordered the respondents to pay to the petitioner a *certain amount due under a contract*, which *amount was disputed*, and then reserved to the respondents the right to litigate the question concerning which the original difference of opinion arose. In other words, the Supreme Court, by the writ of mandamus, compelled the Auditor and the Insular Purchasing Agent to pay the full amount alleged to be due under *a contract while said amount was in dispute*, but *reserved to the Government the right to bring an independent action for the purpose of settling the question in dispute* between the parties originally.

We are unable to understand how the Supreme Court ever gave its consent to the issuance of mandamus to compel the payment of a disputed claim arising under a

contract. If we understand the scope and purpose of the writ of mandamus and the jurisprudence relating thereto, there is no *rule* better established than the one, that such a remedy is not the proper remedy for the *enforcement of contract rights* of a private or personal nature, or debts, and *obligations which rest wholly upon contract* and which involve no question of trust or official duty, cannot be enforced by mandamus. *A contrary doctrine would necessarily have the effect of substituting the writ of mandamus in place of a decree for specific performance* and the courts have, therefore, steadily refused to extend the jurisdiction into the domain of contract rights.

State vs. Zanesville, etc. Co., 16 Ohio State 308.
State vs. County Court, 39 Mo. 375.
Parrott vs. City, etc., 44 Conn. 180.
State vs. Einstein, 46 N. J. Law, 479.
State vs. Trustees, etc., 114 Indiana 389.
High on Extraordinary Legal Remedies (3rd Ed.) sec. 25.
Portman vs. Fish Commissioners, 50 Mich. 258.
Board of Education vs. Runnels, 57 Mich. 46.
People vs.. Thompson, 99 N. Y. 641.

We deem it unnecessary to refer to the statutory authorities relied upon in the majority opinion, for the reason that they have been discussed above. In that discussion it has been demonstrated that none of the statutory authorities cited justifies the conclusions of the majority opinion.

In our judgment, the demurrer should have been sustained, and the writ of mandamus denied.

(Sgd.) E. FINLEY JOHNSON
(Sgd.) JAMES A. OSTRAND

On September 22, 1925, the Clerk of the Supreme Court of the Philippine Islands sent to the respondent the following notification:

(CAPTION AND TITLE OMITTED)

Sir:

You are hereby notified that on the 21st day of September, 1925, a decision rendered by this Court in the above-entitled cause was filed in this office, whereby it is declared that the petitioner is entitled to the writ as prayed for in the petition, without costs to either party. Ten days after the publication of this decision, final judgment will be entered and five days thereafter the records will be remanded to the court below.

For the Clerk,

(Sgd.) V. ALBERT,
Clerk.

On September 24, 1925, the respondent filed the following motion:

(CAPTION AND TITLE OMITTED)

MOTION FOR RECONSIDEERATION

Now comes the respondent Insular Auditor in the above-entitled case and moves for a reconsideration of the decision rendered by this Honorable Court on September 21, 1925, on the ground that said decision is contrary to law and the facts admitted by the pleadings.

(Sgd.) BEN F. WRIGHT,
Insular Auditor—Respondent.

Manila, P. I.
September 23, 1925.

On September 28, 1925, the Supreme Court issued the following resolution:

> "Upon consideration of the motion of the respondent filed in case R. G. No. 23601, Ynchausti & Company vs. Ben F. Wright etc., praying that the decision heretofore rendered therein be reconsidered, MOTION DENIED, Mr. Justice Ostrand dissented."

On September 30, 1925, the respondent filed the following exception and notice of intention to apply for a writ of certiorari to the Supreme Court of the United States:

(CAPTION AND TITLE OMITTED)

Comes now the respondent Auditor for the Philippine Islands and excepts to the decision of this Court in denying his motion for a reconsideration in the above entitled action, and also excepts to the final judgment entered herein.

Notice is hereby given that the respondent intends to petition the Supreme Court of the United States for a writ of certiorari for the review of the decision and judgment of this Court in view of the fact that it involves an interpretation and application of the laws of Congress of the United States.

The said respondent respectfully requests a stay of the judgment of this Court during the pendency of the application for the writ of certiorari and of the proceedings in the Supreme Court of the United States.

Manila, P. I., September 30, 1925.

(Sgd.) BEN F. WRIGHT,
Auditor for the Philippine Islands, Respondent.

On October 6, 1925, the following final judgment was entered:

YNCHAUSTI & CO.,
Petitioner,
vs.
BEN F. WRIGHT, *as Auditor of the Philippine Islands Respondent.*

JUDGMENT
October 6, 1925
File No. 23601

The Court having regularly acquired jurisdiction over the above entitled cause, submitted by both parties for decision after consideration thereof by the Court upon

record, its decision and order for judgment having been filed on the 21st day of September, 1925;

By virtue thereof, it is adjudged and decreed that the respondent, BEN F. WRIGHT, as Auditor for the Philippine Islands, be and he is hereby required and commanded to countersign for payment by the Insular Treasurer warrant No. 210175 drawn by the Insular Collection of Customs under date of November 26, 1924, for the payment of petitioner, Ynchausti & Co., of the sum of P159,960.00 covering the refund of protested import duties paid under entry No. 31654-A, Protest No. 14061.

Neither party to recover costs.

(Sgd.) V. ALBERT,
Clerk, Supreme Court, P. I.

(SEAL)

Certified correct:

V. ALBERT,
Clerk, Supreme Court, P. I.

On October 28, 1925, the Supreme Court, issued the following resolution:

"Upon consideration of the motion of the respondent filed in case R. G. No. 23601, Ynchausti & Company vs. Ben F. Wright, as Auditor for the Philippine Islands, excepting to the decision of this Court in denying his motion for reconsideration as well as to the final judgment; giving notice of his intention to petition the Supreme Court of the United States for a writ of certiorari for the review of the decision and judgment of this Court, and praying for a stay of the judgment of this Court during the pendency of the application for the writ of certiorari and of the proceedings in the Supreme Court of the United States, and after considering the petitioner's objection thereto unless security be given in accordance with the provisions of section 8(d) of the Act of Congress of February 13, 1925, it is ordered that the EXCEPTION be NOTED,

and a stay of the mittimus or of the execution of the judgment heretofore entered therein is HEREBY GRANTED."

CLERK'S CERTIFICATE

THE UNITED STATES OF AMERICA

PHILIPPINE ISLANDS

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing one hundred forty-one (141) type-written pages (foregoing 134 printed pages) contain a true and correct transcript of the record of the case entitled Ynchausti & Co., petitioner, versus Ben F. Wright, as Auditor for the Philippine Islands, respondent, concerning petition for mandamus, bearing No. 23601 of the General Register of this Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands this 30th day of October A. D., nineteen hundred and twenty-five.

(SEAL)

V. ALBERT,
Clerk, Supreme Court of the Philippine Islands.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1926

The petition herein for a writ of certiorari to the Supreme Court of the Philippine Islands is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.